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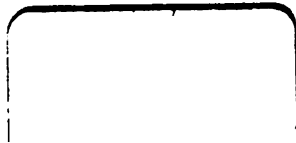


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REPORTS
OF THE
APPELLATE COURT

OF THE
STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CITED, AND
STATUTES CITED AND CONSTRUED, AND AN INDEX.

CHARLES F. REMY,
OFFICIAL REPORTER.
JOHN W. DONAKER, Ass't Reporter.

VOL. 20,

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JUDGES
OF THE
APPELLATE COURT

OF THE
STATE OF INDIANA,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. WOODFIN D. ROBINSON. *
HON. WILLIAM J. HENLEY. †
HON. JAMES. B. BLACK.
HON. DANIEL W. COMSTOCK.
HON. ULRIC Z. WILEY.

* Chief Judge at November Term, 1897.

† Chief Judge at May Term, 1898.

The term of office of each Judge began January 1, 1897.

OFFICERS
OF THE
APPELLATE COURT.

CLERK,
ALEXANDER HESS.

SHERIFF,
DAVID A. ROACH.

LIBRARIAN,
JOHN C. McNUTT.

CASES
ARGUED AND DETERMINED
IN THE
APPELLATE COURT
OF THE
STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1897, AND MAY TERM,
1898, IN THE EIGHTY-SECOND YEAR OF THE STATE.

CITY OF TELL CITY ET AL. *v.* BIELEFELD.

[No. 2,461. Filed April 8, 1898.]

STREETS.—Obstruction.—Municipal Corporations.—A city has no power to authorize the erection of scales in the street. *p. 3.*

SAME.—Obstructions.—Removal.—Municipal Corporations.—An action cannot be maintained against a city for removing scales which had been erected in the street, where such removal was made in a careful and proper manner. *p. 4.*

PLEADING.—Demurrer.—Joint Demurrer.—A demurrer addressed jointly to two or more paragraphs of answer should be overruled if either paragraph of answer is good: *p. 4.*

SAME.—Demurrer.—Form Of.—A demurrer to an answer for the reason that it "does not state facts sufficient to constitute a good answer to plaintiff's complaint," presents no question to the court. *pp. 4, 5.*

From the Perry Circuit Court. *Reversed.*

Patrick & Minor, C. H. Jewett and H. E. Jewett,
for appellants.

W. A. Land, for appellee.

HENLEY, J.—Appellee began this action against appellants, the city of Tell City, Fred Fruchwald,

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marshal of the city of Tell City, and Jacob Froelich, street commissioner of the city of Tell City, by a complaint in one paragraph in which the following facts are stated: That in the year 1887, the city of Tell City granted to appellee a license, for a valuable consideration, to construct, erect and put down Fairbank scales on the west side of Ninth street between Mozart and Jefferson streets in said city, which scales were to be used by appellee for public and private purposes. That in pursuance of the license granted as aforesaid, appellee did construct and erect scales at the aforesaid point in the streets of said city at an expense to him of \$260.00; that the license to appellee so to erect such scales at said point was duly ordered and entered of record at a regular meeting of the city council of said city, and appellee in good faith constructed and maintained said scales in good order and repair at his own expense from the year 1887 until the 10th day of April, 1895, when the marshal and street commissioner of said city, under the orders and direction of said city, and against the protest and objection of the appellee, took down and removed said scales, over the protest and objection of appellee, and without paying or offering to pay appellee therefor, and that by reason of the acts aforesaid appellee has suffered damages in the sum of \$5,000.00. A demurrer to the complaint, for want of sufficient facts, was overruled. The appellant answered in four paragraphs, first the general denial, the second, third, and fourth were special pleas in bar. To this answer a demurrer in the following language was addressed: "The plaintiff demurs to defendant's answer for the reason that said answer does not state facts sufficient to constitute a good answer to plaintiff's complaint." There was a trial by the court and judgment for appellee in the sum of \$265.00.

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It is contended by counsel for appellant that the lower court erred in overruling the demurrer to the complaint. Appellant's contention must be sustained. A city has no power to authorize the construction of anything upon the public highways within the city, which when constructed will permanently interfere with the enjoyment of the rights of either the public or a private person. *Pettis v. Johnson*, 56 Ind. 139; *Adams v. Ohio Falls Car Co.*, 131 Ind. 375. Public streets are public highways, and include within their width the sidewalks. Public highways are the property of the public, and belong to the public from side to side, and from end to end. *State v. Berdetta*, 73 Ind. 185, 38 Am. Rep. 117. A municipal corporation is a corporation of limited powers, and persons dealing with such corporations must take notice of the limitations the law imposes upon them.

The case of *City of Richmond v. Smith*, 148 Ind. 294, we think decisive of the question involved in the case at bar. In the last named case it was held by the Supreme Court that under section 3541, Burns' R. S. 1894, which gives to cities the power to establish and regulate public markets, the city did not have the right to establish such markets in the streets of the city. The Supreme Court in that case, speaking by Howard, J., say: "The streets are primarily for the use of the traveling public. Certain other uses in which the public and the abutting property owners are interested are allowed, but only in such manner and to such extent as may not appreciably impede the use for public travel. Such uses are those for sewers, gas, and water pipes, also telegraph and telephone lines. Provision, too, is made for shade trees along the curb and between the roadway and the sidewalks. No right, however, as we think, could be exercised by a city

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for such an occupancy as that which was here attempted.

"It is true that under clauses 11, 29, and 33 of section 3541, Burns' R. S. 1894 (3106, R. S. 1881), cities have power to establish and regulate public markets. But this can give no right to establish such markets in the streets of the city." Also see *Simms v. City of Frankfort*, 79 Ind. 447. Subdivision 31 of said section 3541, Burns' R. S. 1894, which gives to cities the right to regulate the selling, weighing, and measuring of hay, wood, coal, and other articles, could under no circumstances be held to extend to a city the right to obstruct a street by the establishment of scales thereon, nor could it confer the right upon the city to license any one to place any obstruction on the highways of the city. Appellee having no legal right to erect the scales in appellant's streets, the removal of the same by appellant, if done in a proper and careful manner, cannot be complained of. *City of Indianapolis v. Miller*, 656; *Cheek v. City of Aurora*, 92 Ind. 107. The demurrer to the complaint ought to have been sustained, and for this error the cause will have to be reversed.

It is further urged by appellant that the lower court erred in sustaining the demurrer to appellant's answer. This demurrer was addressed jointly to all four paragraphs of appellant's answer. If either was good, the ruling of the lower court would be erroneous. It was also error to sustain the demurrer because it presented no question to the court, and did not raise the question of the sufficiency of any one or all of the paragraphs of answer. We have heretofore in the opinion set out the language of the demurrer to the answer of appellant. Our Supreme Court has held that such a demurrer was so defective as to present no question to the court. *Thomas v.*

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Goodwine, 88 Ind. 458; *Pine Civil Tp. v. Huber Mfg. Co.*, 83 Ind. 121. Reversed, with instructions to the lower court to sustain the demurrer to the complaint.

THE EVANSVILLE AND TERRE HAUTE RAILROAD
COMPANY v. WILSON.

[No. 2,421. Filed April 19, 1898.]

CARRIERS.—*Stopping Trains at Stations.*—*Rules of Company.*—*Duty of Passengers.*—In the absence of a statutory provision to the contrary, a railroad company may make rules providing that particular trains shall stop only at certain stations, when it furnishes reasonable means for reaching all stations on its road by some of its trains, and it is the duty of a passenger taking passage on a train to inform himself when, where, and how he may stop according to the regulations and time card of the railroad company, and if he make a mistake not induced by the company, he has no remedy against the company for its enforcement of such rule. p. 10.

SAME.—*Ticket May be Supplemented by Parol Agreement.*—The provisions of a railroad ticket may be supplemented by a special parol arrangement whereby the company agrees to stop its train at a place where it is not scheduled to stop. p. 11.

SAME.—*Failure to Stop Train as Per Agreement.*—*Tort.*—*Costs.*—Where a railroad company agrees with a passenger to stop a train at a particular place, a failure to do so is a breach of duty which will support an action in tort. p. 12.

From the Knox Circuit Court. *Affirmed.*

Iglehart & Taylor and *Reily & Emison*, for appellant.

W. A. Cullop and *C. B. Kessinger*, for appellee.

BLACK, J.—The complaint of the appellee, May D. Wilson, after its introductory matter, showed in substance, that on the 6th day of August, 1895, the appellant, by its ticket agent at Vincennes, notified all persons desiring to purchase tickets over its railroad for the purpose of attending a picnic being held in the vicinity of Purcells, that its passenger train going north through that place at about 8:45 or 9 o'clock

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p. m. on that day, would stop and take such persons as desired to be carried as passengers on said train, which passed through Purcells for Vincennes at that time; that on that day, and for days previous thereto, it advertised and suffered to be advertised, by posters put up in public places, and announcements made in the press of Vincennes, that persons wishing to attend the picnic in the vicinity of the Purcells station would be carried from Vincennes to Purcells on said day, and that said train going north through Purcells at said hour would stop and carry said passengers back to Vincennes; that the appellant on said day sold tickets to all persons applying at its office at Vincennes for Purcells and return upon said train; that its ticket agent so notified them, and authorized persons in charge of the picnic to notify others and the public generally at the time the tickets were purchased, that said train would stop, and carry them back to Vincennes; that on said day, the appellee, a resident of Vincennes, desiring to go to Purcells for the purpose of attending said picnic, purchased a ticket therefor and return, which was then and there sold and delivered to her by the appellant for a valuable consideration; that on said evening at and before the time for the arrival of said train, and after having been notified by the appellant's ticket agent at Vincennes when she purchased her ticket, and as otherwise stated, that said train would stop for her, and carry her back to Vincennes, she went to said station, and the proper place thereat, for the purpose of taking said train to be carried as a passenger to Vincennes, having already provided herself with a return ticket as aforesaid; that a part of her ticket used for her passage from Vincennes to Purcells was taken up by the conductor of the train which carried her from Vincennes to Purcells, and that it remained still in the

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possession of the appellant; that the return part of her ticket did not provide for her return on any particular train, but it did provide that it was to be good for one return passage from Purcells to Vincennes, if used on date stamped on the back; that it was stamped on the back, "Union Depot, Vincennes, Indiana, August 6th, 1895;" that there was no stipulation concerning her return on any particular train, but the appellant sold it to her for the sole purpose of returning on said train, and no other, and so agreed with her, and notified her to return on the same, and there was no other train on appellant's road that day for her to return upon; that the appellant disregarded its duty, ran its train through said station without stopping to carry the appellee back to Vincennes, and wrongfully and unlawfully failed and refused to stop its said train and admit her as a passenger thereon; that she hailed said train to stop for her, but it disregarded all signals to stop and ran by and left her at said station, and refused to carry her as such passenger, although the appellant well knew that it had agreed to do so; that it was a dark night; that the appellee was some eight miles from home and without means of being conveyed back to Vincennes; that it was a strange place; that she was in bad health and among strangers; that she had to secure a conveyance to take her back to Vincennes, her home, at great expense; that she was some four or five hours in being returned to her home; that she was exposed to the night air and the perils of a journey from said place under said circumstances to Vincennes. There were a number of averments relating to damages which need not be set out. It was further alleged that said train was the only train which the appellant at that time was running as a regular train on that evening to Vincennes.

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Issues were formed, the trial of which by jury resulted in a general verdict for the appellee for thirty dollars. The jury also returned answers to interrogatories submitted by each party. It was thus specially found, in substance, that on the 6th of August, 1895, the appellee went from Vincennes to Purcells on a train of the appellant, upon a ticket of which the following is a copy: "Evansville Route. Evansville & Terre Haute Railroad. Vincennes to Purcells. Good only on date of sale for continuous passage on trains stopping at points named when stamped by selling agent. Form F. Evansville Route. Evansville & Terre Haute Railroad. Good for one return passage. Purcells to Vincennes. If used on date stamped on back, otherwise void. Form F."

It was found that in addition to the contract contained in the ticket, the appellant contracted to carry appellee to Purcells and back to Vincennes, the additional contract being made with C. N. Cheever, ticket agent of the appellant; that he had authority from the appellant to make such contract other than that he possessed by reason of his being such ticket agent; that F. P. Jeffries, general passenger agent of the appellant, made a special contract by which the appellee was to be returned from Purcells to Vincennes on the train passing Purcells going north at 8:45 or 9 p. m.; that said train going north, by the rules and regulations of the railroad, did not stop at Purcells at, and for more than one year before said date; that it did not on said evening stop at Purcells for the appellee to take passage to Vincennes; that the appellant had a passenger train at Purcells about 11 o'clock p. m. at said date, and stopped it there for the appellee to ride thereon to Vincennes; that she left Purcells and returned to Vincennes before the train sent by the

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appellant reached Purcells; that it was a warm, pleasant, moonlight night at Purcells, but cool after 9 o'clock; that appellee returned to Vincennes by some means other than a car of appellant on its railroad; that on account of her going home by other means she suffered by taking cold, and was put to expense in the sum of twenty-five cents; that by reason of appellant's failure to carry her from Purcells to Vincennes, she suffered humiliation or indignity; that the defendant notified her that said train would stop at Purcells, the notice being given by C. N. Cheever, on that day, verbally; that the train on which the appellant agreed to carry her back when she bought her ticket, was known as train No. 4; that the appellant failed to stop this train at Purcells because the superintendent of the appellant, William Corbett, neglected to notify the crew in charge of the train to do so; that when she bought her ticket, appellant agreed with her that it would stop train No. 4 going north through Purcells at 8:45 or 9 o'clock p. m. to carry her back to Vincennes on said ticket; that appellant failed so to stop the train because it neglected to notify the crew in charge of the train to stop at Purcells; that her ticket was sold her for the purpose of her return on said train No. 4; that at the time appellant sold her the ticket it did not have running on said road any train for her return other than said train No. 4; that appellant sent an engine and borrowed coach to Purcells to bring appellee back to Vincennes, because it had forgotten to have train No. 4 stop for her to carry her back to Vincennes.

The appellant's motion for judgment upon the jury's answers to interrogatories, and its motion to tax the costs against the appellee were overruled. These rulings are assigned as errors, and the question as to the sufficiency of the complaint is for the first time pre-

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sented by assignment of error. The complaint does not allege that by the rules and regulations of the appellant the station of Purcells was a regular stopping place for the train, upon the failure to stop which the complaint is based. It is a well established general rule, that in the absence of statutory provision to the contrary, a railroad company may make rules providing that particular trains shall stop only at certain stations, when it furnishes reasonable means of reaching all stations on its road by some of its trains, and that it is the duty of a person taking passage on a train to inform himself when, where, and how he may stop according to the regulations and time card of the railroad company, and if he make a mistake, not induced by the company, he has no remedy against the company for its enforcement of such rule. *Pittsburgh, etc., R. W. Co v. Nuzum*, 50 Ind. 141, 19 Am. Rep. 703; *Chicago, etc., R. R. Co. v. Bills*, 104 Ind. 13; *Ohio, etc., R. W. Co. v. Applewhite*, 52 Ind. 540; *Pittsburgh, etc., R. W. Co. v. Lightcap*, 7 Ind. App. 249; *Baltimore, etc., R. R. Co. v. Norris*, 17 Ind. App. 189, 60 Am. St. 166; *Lake Erie, etc., R. R. Co. v. Lucas*, 18 Ind. App. 239.

In a complaint by a ticket holder for failure to stop the train on which he is traveling at the station named in his ticket, it is necessary to show that the regulations of the railroad company provided that the train should stop at such place; and so, also, in order to put the railroad company in the wrong, in a complaint for failure to stop a train to receive the ticket holder, it should be made to appear that it was the duty of the company toward the ticket holder to so stop the train. But the company may make a special arrangement for the stopping of a particular train at a certain station at which under the general rules and regulations it is not required to stop. Such a

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contract is not unlawful, and the breach of it whereby the ticket holder, induced to take passage under it, is prevented from returning to his home as contemplated by the contract, by reason of the failure to stop the train, would entail upon the railroad company liability for violation of duty. See *Pittsburgh, etc., R. W. Co. v. Nuzum, supra*; *Ohio, etc., R. W. Co. v. Hatton*, 60 Ind. 12; *White v. Evansville, etc., R. R. Co.*, 133 Ind. 480; *Chicago, etc., R. R. Co. v. Dumser*, 161 Ill. 190, 43 N. E. 698. It is suggested in argument that such an arrangement for the stopping of a train contrary to the general rules and regulations cannot be made by a ticket agent.

It is sufficiently alleged in the complaint that the special regulation for stopping the train, by way of notice to her and agreement with her, was made by the appellant, and the special findings of the jury are not inconsistent with the general verdict. Whatever may be the proper view as to whether or not the passenger's ticket or provisions therein should be treated as a contract, we are of the opinion that it may be supplemented by such special matter in parol as the arrangements here shown for the stopping of the train. And while it is doubtless true that it is not within the implied authority of agents for the sale of tickets at its stations to change the duly established regulations of the company for the stopping of its passenger trains, yet where a ticket has been purchased and in part used under the circumstances disclosed in this case, the company is liable for the damages resulting to the passenger for failure to stop the train. The case is not one requiring us to go further and to decide as to the responsibility of the company for the injurious consequences of the giving of merely false information by a ticket agent to a passenger concerning the running or stopping of trains. There ap-

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pears to have been a negligent failure to stop the train when and where it was the duty of the company toward the appellee to stop it.

The appellant moved to tax costs against the appellee, because the verdict was for a sum less than fifty dollars, it being assumed that the action was upon contract. Under the relation created by the facts in the case, the appellant owed the appellee a duty, the violation of which was a tort. The contract of carriage was an incident in the creation of the relation from which the duty arose. The action was based upon the violation of the duty, and was in tort. The judgment is affirmed.

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[No. 1,978. Filed April 20, 1898.]

APPEAL AND ERROR.—*Death of Appellee.*—*Jurisdiction.*—The Appellate Court has no jurisdiction of an appeal prosecuted against a party who died after the rendition of the judgment from which the appeal was taken and before the filing of the appeal in the Appellate Court. *pp. 12-14.*

SAME.—*Death of Appellee.*—*Assignment of Errors.*—*Amendment.*—Where, after the rendition of a judgment, and pending an appeal to the Appellate Court the appellee dies, the assignment of errors cannot be amended by substituting appellee's representatives as appellees after the expiration of the time for appeal. *p. 16.*

From the Vigo Circuit Court. *Appeal dismissed.*

Davis & Turk, John L. Patterson and McNutt & McNutt, for appellant.

Lamb & Beasley, for appellees.

HENLEY, J.—Appellant filed his complaint and affidavit in attachment against appellees in the lower court. The Vigo Agricultural Society of Vigo county was made a garnishee defendant only. Appellee, Samuel A. Brown, answered the complaint and affidavit in attachment by a plea in abatement. A de-

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murrer to this answer was overruled. Appellant refused to plead further, and upon motion of appellee Brown judgment was rendered against appellant. This judgment was rendered on the 15th day of March, 1895. Appellant prayed an appeal to this court. The record was filed in the office of the clerk of this court on the 20th day of December, 1895. After the judgment was rendered and before the appeal was taken the appellee Samuel A. Brown died. The appeal was prosecuted against the said Samuel A. Brown without regard to the fact that there was no such person in existence at the time the appeal was taken. On the 28th day of January, 1896, appellant filed a motion in this court entitled *Budd Doble v. Samuel A. Brown*, in which the court was asked to substitute for Samuel A. Brown, one of the appellees herein, the name of William A. Brown, executor of the will of Samuel A. Brown. Accompanying the motion and filed with it were the proofs of the death of said Samuel A. Brown. This motion was granted by the court. No further action was taken by appellant until the 25th day of October, 1897, when leave was asked by appellant to file an amended assignment of errors. On December 3, 1896, appellees moved to dismiss the appeal for the following, amongst other reasons: (1) Because there is not now, and was not at the time the assignment of errors was filed in this court, any such person living as Samuel A. Brown, who is named as appellee in the assignment of errors herein, as shown by the proof on file. (2) Because the assignment of errors is defective in this, to wit: That Samuel A. Brown is named as appellee in the assignment of errors, whereas said Samuel A. Brown was dead before the transcript and assignment of errors were filed in this court, as is shown by the proof on file. (3) Because the appeal was taken in the name

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of Budd Doble as appellant against Samuel A. Brown and Vigo Agricultural Society, appellees, and notice of appeal was served on Lamb & Beasley, attorneys of record for Samuel A. Brown, long after the death of said Brown, as is shown by the proof on file in this court. (4) Because Samuel A. Brown, named and designated in the assignment of errors as an appellee, died after judgment in the court below and before this appeal was taken and before the transcript was filed in this court, and notice of appeal was served upon the attorneys of record in the court below for said Brown, instead of being served upon William A. Brown, executor of the will of Samuel A. Brown, deceased.

The facts stated in each of the four specifications of the motion to dismiss are borne out and established by the record. No valid appeal was ever taken in the cause, the attempted appeal is a fiction and a nullity. It is provided by section 648, Burns' R. S. 1894, that "In case of the death of any or all the parties to a judgment before an appeal is taken, an appeal may be taken by, and notice of an appeal served upon, the persons in whose favor and against whom the action might have been revived if death had occurred before judgment." This is the section of the statute under which the parties to this action should have proceeded. It has been held under this section by the appellate courts of this State, that they have no jurisdiction of an appeal prosecuted by or against parties who had died after the rendition of the judgment from which the appeal was taken and before the filing of the appeal in the appellate court. *Taylor v. Elliott*, 52 Ind. 588; *Taylor v. Elliott*, 53 Ind. 441; *Branham v. Johnson*, 62 Ind. 259; *Moore v. Stack*, 140 Ind. 38. In the case of *Moore v. Stack*, *supra*, the Supreme Court of this State say: "In a notice on the appellees of

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such motion to substitute they state that said Belinda A. Moore died before the appeal was taken. Service of this notice is acknowledged by the attorneys for the appellees, and in such acknowledgment say they agree that the substitution may be made. The right to substitute depends on the question whether any appeal is pending at all." The opinion then sets out section 648, *supra*, and continues: "Under this statute it has been held by this court that an appeal taken to the Supreme Court in the name of a dead appellant is a nullity." At this point in the opinion the court quotes at length from the opinion in the case of *Taylor v. Elliott*, 53 Ind., on page 442, and continuing says: "Another section provides that 'The death of any or all the parties shall not cause the proceedings to abate; but the names of the proper persons being substituted, upon consent or upon notice, the cause may proceed.' Section 649, Burns' R. S. 1894 (637, R. S. 1881). This is the section the counsel were aiming to act under in this case. But it clearly does not apply, as it is evidently intended to apply only to a case where the death occurs after the appeal and before the submission of the cause; because another section provides that, 'If the death of any or all the parties occur after the submission of a cause, judgment shall be rendered as at the term at which the submission was made, without any change of parties.' Section 675, Burns' R. S. 1894 (663, R. S. 1881). As there was no valid appeal taken in this case, there can be no substitution of parties, either with or without the consent of the appellees, this court having no jurisdiction."

This court acquired no jurisdiction of Samuel A. Brown, nor of the appeal herein, and the order made by this court on the 31st day of January, 1896, substituting William A. Brown, executor of the will of

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Samuel A. Brown, as appellee, in the place of Samuel A. Brown, was void, because the appeal was void, and conferred no jurisdiction upon this court over the cause. "No real appeal having been taken, the court never having acquired jurisdiction of the cause, the substitution of a real name in the appellate court in a fictitious appeal on the docket of that court will not convert the fictitious appeal into a real one and give the court jurisdiction of the cause." *Taylor v. Elliott*, 53 Ind. 441. But if this court should have held that the action of the court in granting appellant's motion to substitute the name of William A. Brown, executor, etc., in the place of Samuel A. Brown, appellee, was valid, and that the court could under the law make such an order, still appellant would be in no better situation, because his assignment of errors is fatally defective, as his motion to amend was not filed in this court until October 25, 1897, nearly two years after the pretended appeal was filed in this court. This court will not permit the amendment of the assignment of errors as to a material matter, after the expiration of the time for appeal. There having been no valid appeal taken in this cause, any action of the court herein would be a nullity. The cause is therefore stricken from the docket.

HAMILTON v. HANNEMAN.

[No. 2,460. Filed April 20, 1898.]

INSTRUCTIONS.—*Repetition of Instructions*.—Where a proposition of law is clearly and fully covered by an instruction it is not error to refuse an instruction covering the same proposition. *p. 20.*

SAME.—*Directing Verdict*.—It is within the province of the court to direct a verdict by instructions only where there is a total absence of evidence upon some essential issue, or where there is no conflict, and the evidence is susceptible of but one inference. *pp. 20, 21.*

EVIDENCE.—*Weight of*.—Where there is some evidence to support the

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judgment the Appellate Court will not weigh the evidence or disturb the judgment. p. 22.

APPEAL AND ERROR.—*Failure to Discuss Error Assigned.—Waiver.*

—The failure to discuss error assigned amounts to a waiver of such error. p. 22.

From the Marion Circuit Court. *Affirmed.*

J. E. McCullough and H. N. Spaan, for appellant.

John M. Bailey, for appellees.

WILEY, J.—Appellant was plaintiff below, and commenced an action in replevin before a justice of the peace, against appellee. He gave the necessary bond, the goods and chattels were seized by the constable under the writ, and the possession thereof delivered to the appellant. In the justice's court, trial was had before a jury, resulting in a verdict and judgment for the appellee. Appellant appealed to the circuit court, where it was tried by a jury, resulting in a verdict for appellee, but the verdict was set aside and a new trial granted. On the second trial, in the circuit court, the jury again returned a verdict for appellee, and over appellant's motion for a new trial, judgment was pronounced on the verdict in favor of appellee. The only error assigned is the overruling of the motion for a new trial. The motion for a new trial was based upon the following reasons: (1) That the verdict was contrary to the evidence; (2) that the verdict is not sustained by the evidence; (3) that the verdict is contrary to law; (4, 5, 6) that the court erred in giving and in refusing to give certain instructions; (7, 8, 9) that the court erred in admitting certain evidence over appellant's objections.

The record shows that appellee is a married woman, and that on September 15, 1893, she borrowed of one Wilson \$50.00, for which she gave her note for \$57.50, due in thirty days, and secured the payment thereof

by a mortgage on household goods, etc. She made payments on this note from time to time, until July 17, 1894, when she was informed by said Wilson that there was still due the sum of \$53.00, and that she would have to give a new note and mortgage for that amount in lieu of the former one, and that if she would do so, he would surrender the old note and release of record the old mortgage. She accordingly executed an additional note for \$55.00, due in thirty days, and secured its payment by a chattel mortgage covering the same property as that embraced in the first mortgage. Before the maturity of the second note, which was payable in bank, Wilson assigned it to appellant, for which appellant is alleged to have paid \$53.00. When the note became due, appellant notified appellee that he held it, and that she must pay it. She called on him in response to said notice and told him she could not pay it all; that she had paid on said indebtedness over \$70.00 and that the note was given without any consideration. After this she made payments to the appellant, six in all, in the sum of \$33.00 and refused to pay any more.

The property mortgaged was of the value of about \$100.00. On her refusal to pay any additional sum, appellant commenced this action, and claims ownership and possession of the property described in the mortgage, by virtue of a provision therein, that in default of payment, the property should vest absolutely in the mortgagee, and he should have the right to the possession thereof.

The issue tendered by appellee was (1) general denial, and (2) that before the note sued on was given she had overpaid the original note of \$57.50, in that she had paid over \$70.00 thereon; that Wilson fraudulently represented to her that there was still due \$55.00, and that if she would give a new note for that

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amount and secure it by mortgage, he would accept it in lieu of the old note, etc., and release of record the original mortgage; that relying thereon she executed the note and mortgage in suit; that the same was given without any consideration, and that appellant knew said facts when he took an assignment of said last note.

Appellant contends that he was an innocent, *bona fide* purchaser, for value, and that the record does not contain any evidence to the contrary. The note was payable in a bank of this State.

True there is no direct and positive evidence in the record, to the effect that appellant knew the facts relating to the transaction, and as set up in the answer, but there are circumstances, conditions, facts and surroundings disclosed by the evidence and record, from which the jury might reasonably infer that appellant was not an innocent purchaser, and that he had knowledge of the facts.

We will now briefly examine the instructions given and refused, of which appellant complains. Appellant tendered two instructions which the court refused to give. In the first one, the court was requested to instruct the jury that there was no direct evidence that appellant knew that there was any defense to the note, or that he purchased it other than in good faith; that the circumstances which would justify such inference must be pointed and emphatic, and must lead directly and irresistibly to the conclusion, etc., and that circumstances calculated to awaken suspicion merely are not sufficient.

The second instruction asked by appellant was as follows: "There is no sufficient evidence in this case tending to show that the plaintiff was not a purchaser in good faith before maturity of the note claimed to have been purchased by him of Wilson, and in arriv-

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ing at your verdict in this case, you should consider the plaintiff a *bona fide* holder and purchaser of said note."

Appellant's insistence that it was reversible error to refuse to give these instructions cannot be maintained. While the first instruction may properly have stated the law as to the facts, yet there was no error in refusing to give it, because the court, in its own instructions covered the exact questions there presented. True, the court stated the law in different language than counsel for appellant put it, but as it was correctly stated, the appellant was not harmed by refusing the instruction tendered by him. Where the jury is once fully and clearly instructed upon a given point, the court is not bound to repeat the instructions in different language. *Chicago, etc., R. R. Co. v. Boggs*, 101 Ind. 522, 51 Am. Rep. 761.

The Supreme Court in many cases have held that where a proposition of law is once fully and clearly stated to the jury, it need not and ought not to be repeated in subsequent instructions. *Union Mutual Life Ins. Co. v. Buchanan*, 100 Ind. 63; *Turner v. State*, 102 Ind. 425; *Louisville, etc., R. W. Co. v. Falvey*, 104 Ind. 409; *Louisville, etc., R. W. Co. v. Jones*, 108 Ind. 551.

And it follows that it is not error to refuse to give an instruction, which in another form, had been substantially given. *Logan v. Logan*, 77 Ind. 558; *Williamson v. Yingling*, 93 Ind. 42; *Conrad v. Clauve*, 93 Ind. 476, 47 Am. Rep. 388; *Barnett v. State*, 100 Ind. 171; *Cline v. Lindsey*, 110 Ind. 337; *Stephensen v. State*, 110 Ind. 358; *Louisville, etc., R. W. Co. v. Wright*, 115 Ind. 378; *Delhaney v. State*, 115 Ind. 499; *Staser v. Hogan*, 120 Ind. 207.

The court correctly refused the second instruction tendered by appellant, for it clearly invaded the

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province of the jury. The instruction plainly says to the jury that there was no evidence of any character that appellant was not a purchaser in good faith of the note in question, before maturity, and that arriving at their verdict they should consider the appellant a *bona fide* purchaser and holder of the note. This instruction, in substance, directed the jury to return a verdict for appellant. It was a palpable invasion of the right of the jury on a question of fact, and the court correctly refused to give it. It is within the power of the trial court to control or direct a verdict by instructions, only where there is a total absence of evidence upon some essential issue, or where there is no conflict, and the evidence is susceptible of but one inference. *Vance v. Vance*, 74 Ind. 370; *Adams v. Kennedy*, 90 Ind. 318; *City of New Albany v. Ray*, 3 Ind. App. 321.

As to the instructions given to the jury by the court on its own motion, we are unable to find any reversible error in them. After a careful consideration of them as a whole, we have arrived at the conclusion that they fairly, clearly, and fully state the law applicable to the facts.

It appears very much to us, from all the facts and circumstances, as disclosed by the record, that appellant and Wilson got appellee in their grasping clutches and were after the last "pound of flesh." Appellee mortgaged her household effects to secure the payment of \$50.00, borrowed of Wilson as her "lawful agent." She paid and caused to be paid at least \$94.00, about which there is no dispute, being \$44.00 more than the amount borrowed, and yet appellant insists that there is an unpaid balance of \$22.00, in default of the payment of which, he became the owner and entitled to the possession of the mortgaged property; so to hold, under the facts in the

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case, would be a license to money lenders and pawn-brokers, to plunder those within their power, and uphold their actions in the name of the law. Both appellant and Wilson were engaged in loaning money on chattel mortgage security, and their offices were in close proximity to each other.

After three juries, with the witnesses and all the facts before them, have passed upon the facts and resolved them in favor of appellee; and after the trial court, with the same knowledge and opportunities, has by its deliberate judgment said that the verdict was just and should stand, we do not feel at liberty to disturb the judgment on the facts.

Where there is some evidence to support the judgment, the appellate tribunal will not weigh the evidence or disturb the judgment. And, as we have said, there are facts and circumstances upon which the jury might have and doubtless did found their verdict, and hence we cannot review their action. Citation of authorities upon this proposition is wholly unnecessary.

One of the reasons assigned for a new trial was that the court erred in admitting certain evidence over appellant's objections. If this was error it is waived by failure to discuss it. We find no reversible error in the record, and the judgment is affirmed.

LEITER ET AL. v. EMMONS.

[No. 2,443. Filed April 21, 1898.]

CONTRACTS.—*Complaint.—Demand.*—A complaint for the price of certain wheat was based upon the following instrument: "Received of Lydia Emmons forty-two 85-60ths bush. wheat, in store, to be paid for on demand, in flour at 36 lbs. per bush., and twelve lbs. bran, subject to any loss by fire or otherwise." *Held*, that the complaint, to be good as against a demurrer, must allege a demand for payment in flour and bran. *pp.* 23, 24.

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CONTRACTS.—Construction.—Extrinsic Evidence.—Where it cannot be determined from a contract itself whether the parties intended a bailment or a sale, resort may be had to extrinsic evidence. *p. 25.*

SAME.—Construction.—Usage.—Although usage cannot control an express contract, yet, where a contract is ambiguous, the presumption is that it was made with reference to known usage or general course of the particular business. *p. 25.*

From the Fulton Circuit Court. *Reversed.*

George W. Holman, R. C. Stephenson and Baker & Bibler, for appellants.

Conner & Rowley, for appellee.

ROBINSON, C. J.—Appellee sued appellants for the price of certain wheat alleged to have been sold and delivered by appellee to appellants. The complaint is in four paragraphs, each based upon a separate transaction. With each paragraph is filed a receipt given by appellants when the wheat was delivered. These are all substantially the same. That filed with the first paragraph is as follows: "Pottowatomie Mills, Rochester, Indiana, October 12, 1894. Received of Lydia Emmons forty-two 35-60ths bush. wheat, in store, to be paid for, on demand, in flour at 36 lbs. per bushel, and 12 lbs. bran, subject to any loss by fire or otherwise. Signed. Leiter & Peterson."

The receipt shows credits for a certain amount of flour and bran received in part payment.

It is alleged in the complaint that appellants had paid appellee at different times a certain amount of flour and bran as part of the purchase price of said wheat, and that after deducting such credits there remained due and owing appellee the market price of 25 and 22-60ths bushels, which was worth 67 cts. per bushel; that before the commencement of this action appellee "demanded of the said defendants, pay for said balance due her as aforesaid, and at the time of making such demand, wheat was worth, in Rochester,

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Indiana, 67 cts. per bushel, but they refused and still refuse to pay the same, or any part thereof."

A demurrer was overruled to each paragraph of complaint. Appellant answered in four paragraphs, the first of which, the general denial, was withdrawn. Demurrers were sustained to the remaining paragraphs of answer.

A receipt may be so drawn that it will constitute a contract, and that was done in this case.

By the terms of the contract appellee was entitled to flour and bran only, in payment for the wheat. She had agreed to accept specific personal property in payment, and she was to receive it only upon demand. No time was fixed when appellants should deliver the flour and bran, nor were they required to do anything until a demand was made by appellee. It was incumbent upon her, before bringing suit, to demand of appellants flour and bran equivalent to the balance of the wheat. She does allege that she demanded pay for the balance of the wheat which was worth 67 cents per bushel. But this was not a demand for what appellants agreed to pay. The pleading does not show that appellants had failed or refused to do anything under the contract which they had agreed to do. A special demand of the flour and bran was a necessary part of appellee's cause of action, and the absence of this allegation from each paragraph makes the complaint bad against a demurrer. *Frazee v. McChord*, 1 Ind. 224; *Ewing v. French*, 1 Blackf. 170; *Wilson v. Dale*, 16 Ind. 399; *Davis v. Doherty*, 69 Ind. 11; *State v. Mooney*, 65 Mo. 494; *Bradley v. Farrington*, 4 Ark. 532; *Widner v. Walsh*, 3 Col. 548.

Other questions discussed by counsel, and which would arise on another trial, will be determined by the construction to be given the receipt above set out.

In construing the contract, and arriving at the in-

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tention of the parties, effect must be given to all the expressions used therein, if that can be done. If appellants had received the wheat and simply agreed to pay for it on demand, in flour and bran, the transaction would clearly be a contract of sale. *Woodward v. Semans*, 125 Ind. 330. But the parties evidently meant something by using the words "in store" and "subject to any loss by fire or otherwise." For us to say that the contract was one of sale, we must say that the parties meant nothing by the words "in store," and this we cannot do, if the contract is capable of being construed with those words left in. The provisions of the contract are not necessarily contradictory, but the contract is ambiguous. The limitation on the liability for loss by fire could have reference to but two things, either the wheat, or its equivalent, flour and bran. It is clear it was not intended to apply to both, and it is equally clear that the parties intended it should apply to one or the other. As it cannot be determined from the contract itself whether the parties intended a bailment or a sale of the wheat, resort may be had to extrinsic evidence to show whether the transaction was a bailment or a sale. As it was a contract made with reference to a particular business, it is presumed that it was made with reference to the ordinary course of such business. In such case it would be proper to consider the general and known course of business of appellants. While it is true that usage cannot control an express contract, yet where a contract is ambiguous, the presumption is that it was made with reference to the known usage or general course of the particular business. In such case the question becomes one of fact to be determined as any other question of fact. *Lyon v. Lenon*, 106 Ind. 567; *Reissner v. Oxley*, 80 Ind. 580;

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3 Am. and Eng. Ency. of Law (2nd ed.), 737; *Martindale v. Parsons*, 98 Ind. 174; *Swarts v. Cohen*, 11 Ind. App. 20. Judgment reversed, with instructions to sustain the demurrer to the complaint.

TEAGUE ET AL. v. WHALEY.

[No. 2,476. Filed April 21, 1898.]

DEEDS.—Covenants of Warranty.—Breach Of.—Grantor Must Defend.—Damages.—Where a grantee in a deed of conveyance of real estate is sued for possession, or where an encumbrance is sought to be enforced against the land, he may by giving proper notice to the grantor of the pendency of the suit, and requesting him to defend against the same, relieve himself of such defense and cast such duty upon the grantor; and if the grantor fails or refuses to defend, the grantee may do so, and recover from the grantor damages for the injury to the land, and costs of defending the suit, including attorney's fees. *pp. 29, 30.*

SAME.—An Easement in Land is an Encumbrance.—An easement in real estate is an encumbrance, and the fact that the grantee thereof knew of the existence of an easement against land conveyed to him will not defeat his right to recover from grantor damages for the injury to such real estate by reason thereof. *p. 30.*

SAME.—Covenants of Warranty.—Breach Of.—Notice.—Defense.—Where a grantor of real estate with covenants of warranty, is not made a party to a suit by one having an easement therein, the grantee is required not only to notify him of the pendency of the suit in order to bind him by the judgment, he must also request him to defend the title. *pp. 30-32.*

From the Pike Circuit Court. *Affirmed.*

Thomas H. Dillon and *Virgil R. Greene*, for appellants.

E. P. Richardson and *A. H. Taylor*, for appellee.

COMSTOCK, J.—Appellants were plaintiffs below. The complaint, in substance, alleges that appellee on the 22nd day of March, 1895, was the owner of certain real estate in Pike county, Indiana (describing it), and that on that day appellee sold and conveyed the same to appellants by deed containing covenants for

warranty; that there was a mistake in the description, and that the consideration paid was nine hundred dollars; that at the time of making and delivering said deed said premises were subject to an easement held by one Mary Hayes thereon of nine feet off the east side of the land conveyed; that thereafter on the — day of —, 1895, Mary Hayes brought an action in the Pike Circuit Court against the appellants to have said easement declared of record and enjoining the obstruction thereof; that after the appellants were notified of said suit, the appellants notified the appellee of the pendency of said action and asked him as their grantor to appear and defend said suit and protect the rights of the appellants; that the appellee failed and refused so to do, and they were compelled to defend the same; that they were put to loss of time and expense in court costs and attorneys' fees; that, in addition to said notice the appellee was in the courthouse at the time of said trial, and testified as a witness in said cause, and thereby knew of the effort the said Mary Hayes was making to establish said easement and encumbrance, and he still failed and refused to defend the same; that such proceedings were had in the Pike Circuit Court that upheld said easement, and judgment was rendered against the appellants, enjoining them from molesting said easement, and depriving them of the use of said land occupied by said easement; and that by reason of said judgment, the market value of said land is damaged in the sum of two hundred dollars, and they demand judgment for five hundred dollars, etc.

The appellee appeared and filed a demurrer to the complaint. The court overruled the appellee's demurrer to the complaint, to which ruling of the court the appellee excepted. The appellee filed an answer in three paragraphs, the first of which is the general

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denial. The second paragraph of the answer admits the selling and conveying of the real estate as alleged in the complaint, and alleges that at the time of said conveyance the appellants knew that said real estate was free from any easement, right of way, or any other right in said real estate by Mary Hayes, or any other person; that prior thereto appellants had known said real estate for more than twenty years, and knew that Mary Hayes had no easement or right of way over any part thereof; that the appellants then knew that Mary Hayes was the owner of forty acres of land adjoining the lands conveyed by the appellee to the appellants, and that she was demanding an outlet from her said land over the lands of the appellant to a public road; that the said Mary Hayes never claimed an outlet from her said lands to the said public road over the lands conveyed by the appellee to the appellants while the same was owned and in the possession of the appellee; "that * * * Mary Hayes brought her action against the appellants for a right of way on and over the lands sold, and that said action was tried in the Pike Circuit Court without the knowledge of the appellee; that he was not a party to said suit, and had no notice whatever that it was being claimed in said action that said Mary Hayes owned any part of said land, or that she had any easement on and over any part of the same; that the court in said cause found that Mary Hayes had the right of going over a certain strip of land owned by the appellants, upon her, the said Mary Hayes, paying the fair cash value thereof, and the court found in said action that * * * the value of the use of said strip was fifteen dollars; that it was found and adjudged by the court in said action that the said Mary Hayes, before entering upon said premises, should pay to the appellants in this action, said fifteen dollars, which sum the said Mary

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Hayes paid to the appellants long before the bringing of this suit; that the appellants accepted the same in full payment and satisfaction of the value of the land occupied and used by Mary Hayes, and for said easement and for all damages." The third paragraph of answer is a plea of payment. The appellants filed a demurrer to the second and third paragraphs of answer. The court overruled said demurrer, to which ruling appellants excepted. The appellants filed a reply to the second and third paragraphs of the appellee's answer in one paragraph, being the general denial. The cause, being at issue, was tried by the court, resulting in a finding and judgment in favor of the appellee. Appellants assign as error the overruling of the separate and several demurrers of appellants to the second and third paragraphs of appellee's answer, and the overruling of appellants' motion for a new trial.

We think the demurrers to the second and third paragraphs were properly overruled. The controlling question, however, presented by this appeal is raised by the third assignment of error, viz, the overruling of appellants' motion for a new trial. The reasons specified in the motion are (1) that the decision of the court is not sustained by sufficient evidence; (2) that the decision is contrary to law.

When a covenantee in a deed of conveyance of real estate is sued for possession, or where an encumbrance is sought to be enforced against the land, he may, by giving proper notice of the pendency of the suit to the covenantor, and requesting him to defend against the same, relieve himself of the burden of defending such suit, and cast such duty upon the covenantor, and the covenantor will be bound by the judgment. *Morgan v. Muldoon*, 82 Ind. 347; *Bever v. North*, 107 Ind. 544; *Midland R. W. Co. v. Wilcox*, 122 Ind.

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98. And if the covenantor fails or refuses to defend the action the covenantee may do so, and recover of the covenantor in damages the injury to the land and costs of defending the suit, including attorney's fees. *Burk v. Hill*, 48 Ind. 52; *Quick, Admr., v. Taylor*, 113 Ind. 540; *Hymes v. Esty*, 133 N. Y. 342, 31 N. E. 105; Wait's Act. and Def., vol. 2, p. 400; Wait's Act. and Def., vol. 8, p. 502. An easement is an encumbrance, and the fact that the grantee knew of it will not defeat his right to recover. *Watts v. Fletcher*, 107 Ind. 391.

Whether the judgment in such case would be binding upon the covenantor would depend upon whether a proper notice had been given. The evidence is in the record. It is conflicting as to what was said between the parties in reference to the pending suit. Appellee denies that he was ever requested to defend the suit or to occupy any other relation than that of witness. No evidence was introduced of appellants' claim to the easement, but the proceedings in the action of Hayes against Teague, *supra*. It is not claimed that the notice of the pendency of the suit was in writing. Whether such notice should be in writing has not to our knowledge been passed upon by the Supreme or by this court, and outside of our State the decisions are conflicting. In the following cases it has been held that the notice should be in writing: *Mason v. Kellogg*, 38 Mich. 132; *Dalton v. Bowker*, 8 Nev. 190, 200; *Somers v. Schmidt*, 24 Wis. 417. In *Cummings v. Harrison*, 57 Miss. 275; *Miner v. Clark*, 15 Wend. 426; *Davenport v. Muir*, 20 Am. Dec. 143, it has been held that a verbal notice is sufficient. We believe the better rule to be to require that the notice should be in writing, and that the weight of reason is with the authorities so holding. It is not, however, necessary that we should and we do not decide the question. Where the covenantor is not

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a party to the adverse suit, the covenantee must do more than notify him of the pendency of the action in order to bind him by the judgment. He must request him to defend the title. *Boyd v. Whitfield*, 19 Ark. 470; *Collins v. Baker*, 6 Mo. App. 588; *Paul v. Witman*, 3 Watts & S. (Pa.) 407; *Somers v. Schmidt*, 24 Wis. 421; Rawle on Cov. for Title, section 125, 1st subdivision; *Midland R. W. Co. v. Wilcox*, *supra*. Whether the notice was given and the request made is a question of fact to be determined by the court. *Cook v. Curtis*, 68 Mich. 671. In *Paul v. Witman*, *supra*, it was held that the notice to have the effect of depriving the warrantor of the right to show title "should be unequivocal, certain and explicit. A knowledge of the action and a notice to attend the trial will not do, unless it is attended with express notice that he will be required to defend the title." In the case before us there is a conflict in the evidence as to the notice given by appellants to appellee of the pendency of the suit. Appellee testified that appellants told him they wanted him as a witness, but that he never was told that they wanted him to defend the cause, nor was anything ever said to him about a warranty. It was for the trial court to determine what was said between the parties on the subject, there being a conflict this court will not weigh the evidence.

There was evidence to warrant the court in holding that the notice was not sufficient, in that it did not require appellee to defend. The record of the judgment in the case of Hayes against Teague, in the absence of such proper notice to the appellee, would not be evidence of paramount title in Hayes. *Rhode v. Green*, 26 Ind. 83; *Walton v. Cox*, 67 Ind. 164; 19 Am. and Eng. Ency. of Law, p. 1014; Rawle on Cov. for Title, section 123. Appellants relied solely upon this judgment. This was not sufficient. Had appellants

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shown an existence of the easement when the land was conveyed to them, they would have been entitled to recover with or without notice to appellee of the pendency of the adverse suit. The trial court was justified in holding that there was, on the part of the appellants, a failure of proof. Judgment affirmed.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY v.
BOWER.

[No. 2,876. Filed Jan. 27, 1898. Rehearing denied April 21, 1898.]

MASTER AND SERVANT.—*Fellow Servant.*—*Vice Principal.*—Defendant's agent and foreman engaged in repairing and changing the poles of a telegraph line caused trenches to be dug along the sides of a number of poles for the purpose of moving them, and without any notice or warning to plaintiff, climbed one of the poles and loosed the wire connecting other poles therewith, one of which fell and struck plaintiff, who was engaged in digging a trench at the side thereof. *Held*, that the foreman was in the performance of a duty which he owed to the master, and was a fellow servant with all the others engaged in the common business, and that plaintiff could not recover of defendant for the injury thereby received.

From the Knox Circuit Court. *Reversed.*

Cullop & Kessinger, J. T. Hays and J. H. Drake,
for appellant.

Walter S. Maple and Briggs & Lindley, for
appellee.

HENLEY, J.—This was an action for damages brought by appellee against appellant, resulting in a verdict and judgment for appellee. There were three paragraphs of the complaint, neither of which is assailed in this court. There was a trial by jury and a special verdict returned, consisting of 246 interrogatories and answers. Each party moved for judgment upon the verdict. The motion of appellee was sustained, and that of appellant overruled.

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Appellant's assignment of errors brings before this court for review, the action of the lower court in sustaining appellee's motion for judgment, and in overruling appellant's motion for judgment upon the special verdict. Under the facts as found by the jury, who was entitled to judgment? That is the only question presented for our decision. The complaint being a background upon which the facts found must be viewed, it is important that the pertinent allegations be set out, at least those which are necessarily involved in this decision. It is alleged in appellee's complaint that appellant is a corporation, and was on the 14th day of December, 1895, engaged in erecting and repairing a part of its telephone and telegraph line, which passes through the county of Sullivan; that appellant at that time, and for a long time prior thereto, had been and was represented by one Edgar Torry, who was, on said day, and had been for a long time, appellant's agent, representative, and vice principal, and that said Torry, as said appellant's agent, representative, and vice principal, was by appellant, on said day, authorized to employ and discharge workmen, pay them when discharged, direct employes where to work, what tools to work with, and to control their actions in and about said employment; that Torry as such agent, etc., employed appellee to assist in the work of moving, repairing, and constructing said line through said county; that a part of the work consisted in moving the poles (which had theretofore been erected and the wires strung upon them), some six to fourteen feet further east, on account of the location of a gravel road; that in order to move said poles said Torry directed appellee to dig a trench six feet deep, down to the bottom of the poles, and of sufficient length to allow the pole to be slipped

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to the east to its proper position; that appellee proceeded to dig the ditch, and had the same dug to a depth of four feet, nine feet in length, and two feet wide; that the poles forming the line were numbered from north to south, from number 1338 to 1345, and were set about one hundred feet apart, and while appellee was engaged in digging the trench as aforesaid, "the defendant by its said agent and vice principal, with full knowledge of the facts herein stated, carelessly and negligently climbed to the top of said pole number 1338, after the dirt had been dug away from the east side thereof to the depth of six feet and the length of six feet east, without any ropes, stays, or props attached thereto to prevent its falling, except the telephone wires connecting said poles." That the pole which Torry climbed had just been moved to the east end of the trench dug for the purpose, and that said Torry without any notice or warning to appellee, carelessly and negligently loosened a part of the wires, and carelessly and negligently caused said pole number 1338 to fall or lean to the east; that trenches had been dug by Torry's order six feet deep, and from six to nine feet in length, and two feet wide directly east from the east side of the poles numbered 1339, 1340, 1341, 1342, 1343, and 1344, and were so dug at the time said Torry ascended pole number 1338; that the falling of the pole number 1338 which was attached to the top of the other poles by the wires, caused the other poles where the trenches had been dug to fall in rapid succession, thereby causing pole number 1345, where appellee was working, to fall to the east and over and upon and against appellee, whereby appellee sustained great damage. The complaint further alleges that the appellee was without fault, "and no danger would have arisen, or injury to the plaintiff occurred,

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but for the carelessness and negligent conduct of the defendant's said agent and vice principal, as hereinbefore stated."

It is the purpose of each paragraph of the complaint to hold appellant liable for the negligent act of the man Torry, who in each paragraph of the complaint is denominated the agent, representative, and vice principal of appellant. Was Torry such agent and vice principal, or was he a fellow servant with appellee? A solution of this problem will determine the rights of the parties to this action.

The verdict shows that Torry had authority to direct the men where to work, when to work, and with what tools to work; that he had charge of the work being done; that he employed and paid appellee; that Torry assisted in moving the poles, by helping to dig and fill up the trenches and loosen the wires. Question 225 and answer is as follows: "Q. At the time of plaintiff's injury was Edward Torry on one of the poles that fell, engaged in loosening the wire, as a part of the work in moving the said poles? Ans. Yes."

This act of Torry is the very act of which appellee complains, and which must have caused the injury under the facts as found by the jury. There was no one present directing the work of moving the poles but Torry; the work of moving the poles was first passed upon by appellant's district superintendent, one Calhoun, planned by the superintendent and wire chief, and then turned over to a lineman to be executed. Torry was a lineman in appellant's employ, and it was the duty of lineman, amongst other duties, to move poles when required. We think the rule is well stated that, if at the time the servant performs the act, the result of the performance of which another servant is injured, the offending party is in the performance of a duty which the master owes to his servant,

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then the offending party is not a fellow servant, but a vice principal. But if the offending party in performing the act which caused the injury was engaged in the performance of a duty which he owed to the master then he is a fellow servant with all others engaged in the common business. Or to state the rule as recently expressed by the Supreme Court of this State in the case of *Robertson v. Chicago, etc., R. W. Co.*, 146 Ind. 486: "The rule in this State, now firmly settled, is, that a difference in rank or the power to control and direct or to discharge from service is not the test as to whether one is a fellow servant or vice principal. The controlling inquiry must be as to whether the act or omission resulting in injury involved a duty owing by the master to the injured servant."

And this court in the recently decided case of *Peirce, Rec., v. Oliver*, 18 Ind. App. 87, said: "It is now well settled that the decisive test whether in any given case an employe is to be regarded as a vice principal or a fellow servant, is not his title or rank or power to employ or discharge, but the nature of the services he performs."

The following cases, amongst others, in this State sustain the doctrine as above stated: *New Pittsburgh, etc., Coke Co. v. Peterson*, 136 Ind. 398; *Spencer v. Ohio, etc., R. W. Co.*, 130 Ind. 181; *Justice v. Pennsylvania Co.*, 130 Ind. 321; *Cincinnati, etc., R. R. Co. v. McMullen*, 117 Ind. 439; *Indiana, etc., R. W. Co. v. Dailey*, 110 Ind. 75; *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151; *Salem Stone and Lime Co. v. Chastain*, 9 Ind. App. 453.

Now it is clearly found by the jury in this case that Torry was, when he climbed the pole and loosened the wire, engaged in the performance of a part of the work required to be done to move the poles—the

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common work in which appellee and Torry were both engaged—it was not the performance of a duty which appellant owed to appellee, but the performance of a duty which Torry owed to the appellant, the master.

Under the facts found by the jury Torry occupied the same relation to appellee and the other men employed in the work of removing the poles and repairing and constructing the line, that a foreman or section boss occupies who has under him a gang of men engaged in repairing a railroad.

In the case of *Northern Pacific R. R. Co. v. Peterson*, 162 U. S. 346, the Supreme Court of the United States says in substance: The boss of a small gang in making repairs upon a railroad, over a distance of three sections, aiding the regular gang upon each section as occasion demands, is a fellow servant or a member of the gang, and not a superintendent of a separate department, or in control of such a distinct branch of the work as will render the master liable for his neglect to such co-employees, even if the boss does not actually handle a shovel or a pick. As has been before stated, it was found by the jury that appellant's district superintendent first passed upon the work of moving the poles; that the work was planned by appellant's district wire chief, and then given to the man Torry, a lineman, to carry out.

In the case of *O'Brien v. American Dredging Co.*, 53 N. J. L. 291, 21 Atl. 324, it was said: "Whether the master retain the superintendence and management of his business, or withdraws himself from it and devolves it on a vice principal or representative, it is quite apparent that, although the master or his representative may devise the plans, engage the workmen, provide the machinery and tools and direct the performance of work, neither can, as a general rule, be continually present at the execution of all such

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work. It is the necessary consequence that the mere execution of the planned work must be entrusted to workmen, and, where necessary, to groups or gangs of workmen, and in such case that one should be selected as the leader, boss, or foreman, to see to the execution of such work. This sort of superiority of service is so essential and so universal that every workman, in entering upon a contract of service, must contemplate its being made use of in a proper case. He therefore makes his contract of service in contemplation of the risk of injury from the negligence of a boss or foreman, as well as from the negligence of another fellow workman. The foreman or superior servant stands to him, in that respect, in the precise position of his other fellow servants." The Supreme Court of the United States in a very recent decision, *Central R. Co. v. Keegan*, 160 U. S. 259, held that the New Jersey case above quoted from stated the rule of law correctly.

We think the facts found by the jury in this case, brings it squarely within the rule announced in the Indiana cases cited, and also within the rule as adopted by the Supreme Court of the United States, and that appellee and the man Torry were fellow servants. All of the paragraphs of the complaint proceed upon the theory that Torry was the agent and vice principal of appellant, and that it was his, said Torry's act which caused appellee's injury, any other reason why appellee may have been injured is by the pleader in each paragraph of the complaint expressly disowned. In each paragraph of the complaint it is distinctly alleged that, "there was no danger in doing said digging, and no danger would have arisen, or injury to the plaintiff occurred, but for the carelessness and negligent conduct of the defendant's said agent

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and vice principal, as hereinbefore stated." The negligence "hereinbefore stated" being the climbing by said Torry of one of the poles and the loosening of one of the wires, which work the jury found was a part of the work of moving the poles. It is not alleged that the tools or timbers were in any part defective, nor that the master failed to provide a safe working place for appellee, nor that the master kept in his employ unskilful and incompetent workmen which unskilfulness and incompetency was known to the master and unknown to appellee, and that having notice of such incompetency, the master had failed to discharge such servant, but the whole action is founded upon the theory that the said Torry was the agent and vice principal of appellant. This, the verdict wholly fails to establish.

The lower court erred in sustaining appellee's motion for judgment upon the special verdict and in overruling appellant's motion for judgment upon the special verdict.

For the reasons stated the cause is reversed, with instructions to the lower court to sustain the motion of appellant for judgment upon the special verdict.

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[No. 2,348. Filed April 22, 1898.]

APPEAL AND ERROR.—*Evidence.*—*How Made Part of Record.*—

Waiver of Error.—The record must show that the manuscript of the evidence was filed in the clerk's office before being incorporated in the bill of exceptions, and the agreement of the parties waiving such irregularity will not cure the defect. pp. 40-42.

BILLS AND NOTES.—*Negotiability.*—*Exchange.*—A condition in a promissory note providing for current rate of exchange destroys its negotiability. pp. 42-44.

From the Rush Circuit Court. *Affirmed.*

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John Q. Thomas, for appellant.

Ben. L. Smith, Claude Cambern, Frank J. Hall
and *D. L. Smith*, for appellees.

WILEY, J.—This action originated before a justice of the peace. The appellees appeared and answered, and also filed a counterclaim or set-off, the amount claimed therein, exceeding the jurisdiction of the justice of the peace. Thereupon the case was certified to the circuit court, where it was tried by the court, resulting in a judgment for appellees in the sum of \$240.25.

Appellant moved for a new trial, basing his motion on the following reasons: (1) That the decision of the court was not sustained by sufficient evidence; (2) that the decision of the court was contrary to law, and (3) that the decision of the court was contrary to the law and the evidence. This motion was overruled.

Appellant has assigned error, (1) That the fifth paragraph of appellees' answer to the complaint does not state facts sufficient to constitute a defense to appellant's cause of action; (2) that the court erred in overruling the demurrer to the fifth paragraph of answer, and (3) that the court erred in overruling plaintiff's motion for a new trial.

As the record comes to us, the last assignment of error does not present any question for review in this court, for the reason that the evidence is not in the record. The record does not show that the longhand manuscript of the evidence was filed in the clerk's office, before it was incorporated in the bill of exceptions and before the bill itself was filed therein. Under the repeated decisions of the Supreme and this court, this is a fatal omission.

But counsel for appellant and appellees have filed

an agreement waiving that irregularity. This agreement does not supply the omission in the record and we cannot consider it. This question is no longer an open one in this jurisdiction, for it is put to rest by the adjudicated cases.

In *Davis v. Union Trust Co.*, 150 Ind. 46, a stipulation was filed, similar to the one in the case now before us. Jordan, J., speaking for the court, said: "It certainly must be evident, in the light of the fundamental rules of appellate procedure, that parties to an appeal in this court cannot, by a mere agreement of the character of the one in question, inject into, or bring proceedings of the lower court into the record in this court, when otherwise, under the law, they are no part of said record. Section 661, Burns' R. S. 1894 (649, Horner's R. S. 1897), provides as follows: 'Upon the request of the appellant, or upon being served with notice as aforesaid, and, in either case, upon the payment of the proper fee, the clerk shall forthwith make out and deliver to the party, at his request, or transmit to the Clerk of the Supreme Court, a transcript of the record in the cause, or so much thereof as the appellant, in writing, directs, certified and sealed, to which shall be appended the written directions of the appellant above contemplated, if any.' As a general rule, this tribunal derives its power or rights to consider and determine a case according to methods prescribed by the law, and not by virtue or reason of any agreement of the parties to the appeal. All cases in this court are tried by the record. It furnishes the only evidence to sustain the alleged errors of the trial court of which a party complains. Appeals are heard by the record as legitimately constituted, and by such record all questions are tried and determined, and no deficiency therein, as in the one in the case at bar, can be supplied by the agreement of parties. *Campbell v.*

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State, 148 Ind. 527; Elliott App. Proc. 186, 187; *Blair v. Curry*, 150 Ind. 99, and cases there cited; Weeks Attys. at Law (2d ed.), section 236a.

"It was the duty of the appellants to furnish this court with a correct, complete and orderly arranged and properly authenticated transcript of the record or proceedings of the lower court, except as otherwise provided by law, or, at least, so much thereof as was necessary to present the questions which they desired reviewed or considered. Such a transcript constitutes the record in this court, and it is important that it be made by the method provided by law, and be correct in every respect, as we must accept it as importing absolute verity."

After discussing the principle involved, and citing some authorities, the learned judge continuing, said: "It is manifest that appellee, under the circumstances, was not invested with any power, neither by agreement nor waiver, to relieve appellants of what the law exacted, nor to give this court jurisdiction to hear and determine the questions sought to be presented by this appeal. If it could relieve appellants of that which the law required to be done, in order to make the evidence a part of the record, why not further extend such relief, and thereby exempt them from procuring any part of the proceedings of the lower court to be transcribed and certified to this court, as the law exacts?" See, also, *Blair v. Curry*, 150 Ind. 99.

This leaves but one question, the sufficiency of the fifth paragraph of answer.

The answer, or counterclaim, in brief, is that appellees, as agents of Paffin & Co., sold a piano to a Mrs. Fitzgerald for \$575.00, which amount was to be paid as follows: Cash, \$25.00, and ten dollars per month for fifty-five months, the deferred payments being evidenced by notes; that appellees were to re-

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ceive a commission on such sale of \$243.20; that by agreement the notes were to be made payable to Paffin & Co., but that appellees were to have an interest therein equal to their said commission; that said cash payment and all of said notes were to be turned over to Paffin & Co., and when they had collected a sufficient sum on said notes to pay them the wholesale price of said piano, which was \$331.80, then the balance of said notes should be turned back to appellees; that said notes were assigned or transferred to appellant before maturity, but when said notes passed to appellant, it knew and had full knowledge of all the facts.

The record shows that said notes were payable at a bank in this State, and that they were payable with "current rate of exchange." It is contended by appellant that the notes were negotiable by the law merchant, and that it was not affected by the agreement between appellees and Paffin & Co. This contention cannot prevail. From the facts charged in the answer, appellees had an interest in the notes, to the extent of their commission, and the demurrer admits that all of the facts charged are true. This makes the answer good. Another which discussed by counsel is that the notes were not negotiable, and hence appellant took them subject to any right appellees may have had. That the notes were not negotiable, there seems to be no doubt. They were payable with "current rate of exchange," and this provision in them destroys their negotiability. This exact question has been decided by this court in two recent cases and the doctrine there declared is unquestionably in harmony with the great weight of authorities.

We cite the cases without comment, as we cannot add anything to what was there said. *Nicely v. Winnebago National Bank*, 18 Ind. App. 30; *Nicely v. Com-*

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mercial Bank of Union City, 15 Ind. App. 563. There is no available error in the record. Judgment affirmed.

Henley, J., took no part in the decision of this case.

STEWART v. STRONG.

[No. 2,393. Filed April 22, 1898.]

PARENT AND CHILD.—*Enticing Child Away from Home.—Seduction.—Damages.—Proximate Cause.*—Defendant enticed plaintiff's minor daughter away from home, and, over plaintiff's objection, employed her to perform household duties in his home, where, without his knowledge, she was seduced by his son, and became pregnant with child. *Held*, that the damages sustained were remote, and not the proximate result of such wrongful employment. *pp.* 44-50.

APPEAL AND ERROR.—*Failure to Assess Nominal Damages.*—The Appellate Court will not reverse a judgment for failure to assess nominal damages. *pp.* 50, 51.

From the Greene Circuit Court. *Affirmed.*

John S. Bays, for appellant.

Davis & Moffett, for appellee.

HENLEY, J.—This action was begun by appellant against appellee to recover damages alleged to have been sustained by appellant, on account of the wrongful employment of appellant's minor daughter by appellee, which employment was in opposition to the will of the parent.

It is alleged in the complaint that appellant is a widower and has a large family of children, the most of them being small and requiring care and attention; that appellant's wife has been dead several years, and that since her said death, he, desiring to keep his said family together has relied upon his daughter, Lauretta Stewart, who was a girl of eighteen years, to manage his said home and to care for his said children and himself. That on the 17th day of November, 1893, the appellee with full knowledge of all the

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facts, and intending and contriving to injure appellant, and to deprive him of the comfort, assistance, society, and services of his said minor child, and for the purpose of inducing the said Lauretta Stewart to work for him, the said appellee, did at said time wrongfully, and over the objection and protest of this appellant, and against his will and without his consent, persuade and entice the said minor daughter from appellant's home where she was living and performing the services aforesaid, and took her to his, appellee's home, and kept her for a period of five months, and did thereby deprive appellant of the society, comfort and assistance of said minor child during said period. The complaint then continues in these words: "And said plaintiff further says that said defendant, at the time of the grievances herein mentioned, had a certain son and servant nineteen years of age, who was at said time residing at the home of said defendant. And plaintiff further avers, that after the said defendant had so wrongfully taken said plaintiff's said minor child away from his, said plaintiff's home, and to the home of said defendant, she was then and there and thereby, carelessly and needlessly by said defendant exposed to the wicked influences and unscrupulous designs of said defendant's said son, which facts said defendant well knew or might have known by the exercise of reasonable care and caution. And now said plaintiff says, that by reason of said wrongful persuasion and enticing away of said plaintiff's said minor daughter from his said home, and by so carelessly and needlessly exposing her to the wicked influence and unscrupulous designs of said defendant's said son, she was seduced by said defendant's said son, who then and there, and at said defendant's home, and in said house, debauched and carnally knew said plaintiff's said minor daughter, whereby

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said plaintiff's said minor daughter became pregnant and sick with child, and so continued for a period of near nine months, and that she is now pregnant and sick with child and will continue to be sick from the result of said pregnancy for a long time, to wit, six months."

It is further averred in said complaint that on the 17th day of April, 1894, the appellee brought appellant's said child back to appellant's home, from whence he had taken her, sick and pregnant with a bastard child; that by reason of all the facts as herein detailed, the appellant has been deprived of the services of said minor daughter, and she has been rendered sick and unable to attend to the necessary affairs of appellant, and that he will be deprived of her services for twelve months yet to come, and has already lost her said services for twelve months past and will be compelled to lay out and expend large sums of money in nursing and taking care of his said child, all on account of the wrongs of appellee as hereinbefore detailed. Judgment in the sum of \$5,000.00 is demanded.

Appellee moved to strike out of the complaint all that part which is set out above in the language of the pleader. The lower court sustained the motion, to which ruling the appellant excepted, and has assigned such ruling as error to this court. A demurrer addressed to the complaint assigning as cause that the complaint did not state facts sufficient to constitute a cause of action was overruled. Appellee answered in two paragraphs. The first paragraph was a general denial, the second alleged facts sufficient to show that the appellant had prior to the time appellee employed his said minor child, fully emancipated her. There was a reply in denial, and upon the issue thus joined there was a trial by jury, and a special verdict re-

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turned by way of answer to interrogatories. The court sustained the motion of appellee for judgment upon the verdict, and overruled a similar motion made by appellant.

The principal question in the case arose upon the action of the lower court in sustaining appellee's motion to strike out the part of the complaint heretofore set out in this opinion. It is a question not altogether free from doubt, and in this jurisdiction one upon which the authorities are not uniform.

Stated in the language of the learned counsel for appellant, "The theory of the complaint was that appellee, by wrongfully depriving the father of the services and society of his minor child *against the will of the parent*, was liable to respond in damages for all injury which might and did befall the daughter while in charge of the appellee, as well as for loss of services and expenses for sickness, medical aid, etc., etc."

Would the debauching of appellant's daughter by the son of appellee, as charged in the complaint, be such an injury to appellant as that damages would be recoverable by appellant from the appellee? It is not claimed by appellant in his complaint, that appellee conspired with his son to debauch appellant's infant daughter, neither is it claimed that he connived at or in any way knew of the alleged fact that the girl was being ruined while in his employ, nor does appellant's counsel contend as a matter of law that appellee was negligent in his duty toward appellant's daughter, nor that the debauching of appellant's daughter was the proximate result of the wrongful employment of her by appellee. But it is contended by counsel for appellant that the question of proximate cause can not arise in this case, and can in no way influence the proceedings, because the wrong consisted in enticing and inducing the minor child to leave the parent's

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roof against the will of the parent, and that the wrongdoer will be liable to the parent for any injury which may befall the child while under the control of the wrongdoer, and that the questions of negligence and proximate cause cannot arise.

The following Indiana cases are cited to sustain appellant's contention: *Ft. Wayne, etc., R. W. Co. v. Beyerle*, 110 Ind. 100; *Toledo, etc., R. R. Co. v. Trimble*, 8 Ind. App. 333.

The facts in the case of the *Ft. Wayne, etc., R. W. Co. v. Beyerle*, *supra*, were these: The railway company enticed the minor son of the plaintiff to enter its service as a brakeman, and while engaged in that service, in the discharge of his duties, he was killed. The father brought suit against the company for loss of the services of his minor son. Elliott, J., in pronouncing the opinion of the court, said: "The answers returned by the jury to the interrogatories very clearly show that the appellee's son was guilty of contributory negligence, and that there was no negligence on the part of the appellant. There can, therefore, be no recovery upon the ground that the negligence of the appellant was the cause of George Beyerle's death. If the recovery can be sustained, it must be upon the ground that the appellant was guilty of an actionable wrong in enticing the appellee's minor son to enter its employment." It is further said in the same opinion that, "Where the child of the plaintiff is employed by the defendant against the parents' consent, an action will undoubtedly lie to recover the value of his service. This is an old and familiar principle of the common law. Schouler Domestic Relations, section 260; *Bundy v. Dodson*, 28 Ind. 295. This settled principle will certainly sustain a recovery for the value of the services of appellee's son from the time he entered the service of the appellant until his

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death, and, probably, when carried to its logical extent, it goes much further."

In the case of the *Toledo, etc., R. R. Co. v. Trimble, supra*, this court, speaking by Lotz, J., said: "If one knowingly hire a minor and require him to perform dangerous services in opposition to the parents' will, he will be liable to the parents if injury befall such minor while engaged in such service. In such a case it is not a question of negligence that gives rise to the liability, but the wrong consists in opposing the will of the parents."

The case of the *Grand Rapids & Indiana R. R. Co. v. Showers*, 71 Ind. 451, is also cited by appellant in support of his contention that the question of negligence and proximate cause do not arise in such a case as this.

In none of these cases can we find that the court has held that the question of proximate cause was eliminated by the fact that the minor was employed against the known wishes of the parent, but on the contrary, the rule as stated by Greenleaf that, "The damage to be recovered must always be the natural and proximate consequence of the act complained of," 2 Greenl. Ev., section 256, has been followed uniformly in all the courts of this State. *Western Union Tel. Co. v. Briscoe*, 18 Ind. App. 22; *Fuller v. Curtis*, 100 Ind. 237, 50 Am. Rep. 786; *Cline v. Myers*, 64 Ind. 304.

The Supreme Court in the case of the *Grand Rapids, etc., R. R. Co. v. Showers, supra*, in holding the complaint good which averred the wrongful employment over the objection of the complainant of his minor son, the death of the minor son while engaged in the service in which he was so employed, and the loss of the services of the said son, say: "We do not, of course, mean to say that any other damage than such

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as naturally and proximately result from the act complained of can be recovered, but what we do say is that a good statement of facts is not made bad by an improper claim for damages."

The law is well stated, as to how far a wrongdoer is responsible for his faults, in the case of the *City of Allegheny v. Zimmerman*, 95 Pa. St. 295, where it is said: "One is answerable in damages for the consequences of his faults only so far as they are natural and proximate, and may therefore have been foreseen by ordinary forecast, and not for those arising from a conjunction of his own faults with circumstances of an extraordinary nature."

We think the damages sustained by the appellant, as the result of the debauchment of his daughter by appellee's son, were remote, and were not the proximate result of the wrongful employment of appellant's daughter, and the lower court committed no error in striking from the complaint all that part of it which we have heretofore set out in this opinion.

The question of negligence, not being involved in the cause, we are not called upon to approve or criticise the opinions from which we have quoted, upon this question.

It is next contended by appellant's counsel that the lower court erred in sustaining appellee's motion for judgment on the special verdict. Several items of damages, amounting to the sum of \$101.50, are found by the jury to have been suffered by appellant. One of these is shown by the following question and answer. "Question 9. What was the value of the services of said Lauretta Stewart for the entire time she remained at the home of the defendant Strong as set out in your previous answers. Ans. \$30.00." "Question 10. State what if anything remains unpaid to plaintiff by reason of the services of said Lauretta

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Stewart while at the home of said defendant. Ans. Nothing."

All the other items which go to make up the total as above stated grow out of the wrong done by the son of appellee, and were the direct result of the confinement and pregnancy of appellant's daughter and cannot be considered. The item of \$30.00 assessed by the jury in answer to question numbered nine, above set out, is found by the answer to the question numbered ten to have been fully paid to appellant.

The jury having failed to find that appellant was entitled to any damage by reason of his being deprived of the society and comfort of his minor daughter over his objection, the court could not have assessed more than nominal damages against appellee. This court will not reverse a judgment for failure to assess nominal damages. We find no error in the record. Judgment affirmed.

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TRUSTEE, ET AL.

[No. 2,468. Filed Jan. 27, 1898. Rehearing denied April 22, 1898.]

PRACTICE.—Amendment of Pleading During Trial.—An amendment of the pleadings during the trial necessitates a reswearing of the jury only where the issues are changed by the amendment. p. 53.

SAME.—Amendment of Pleading During Trial.—Discretion of Court.—It is within the discretion of the trial court to permit, upon the trial, the amendment of an answer, and a judgment will not be reversed for such cause in the absence of a showing that the complaining party was misled or prejudiced thereby, and in what respect. pp. 53, 54.

From the Decatur Circuit Court. *Affirmed.*

J. K. Ewing, D. H. Wallingford and C. H. Ewing,
for appellant.

E. E. Roland, B. F. Bennett and T. E. Davidson,
for appellee.

BLACK, J.—The appellant brought its action

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against the appellees for the recovery of the possession of certain personal property, filing a complaint and an affidavit in the forms usual in actions of replevin. The appellees filed an answer in which they alleged "that they, the defendants, do not detain the plaintiff's goods." Among the indorsements on this pleading was the following: "General denial filed." This being the only answer on file, the cause went to trial before a jury. After the opening statement had been made to the jury, and the evidence had been heard, the appellant requested the court in writing to instruct the jury as follows: "Under the issues in this case it is admitted that the property in dispute is the property of the plaintiff, but the defendants deny that they unlawfully detain the same. Therefore, if you believe from the evidence that the plaintiff, before the bringing of this suit, demanded this property of the defendants, and the defendants refused to surrender the same, you should find for the plaintiff."

Thereupon the appellees asked leave of the court to file an amended answer of general denial to the complaint, which leave was granted by the court; to which the appellant objected and excepted. The appellees then filed an amended paragraph of answer to the complaint, being an answer of general denial in the usual form, to which the appellant objected and excepted. The court thereupon refused to give the instruction above set out, to which action of the court the appellant excepted. The court then, upon its own motion, caused the jury to be resworn to try the issues joined in the pleadings, to which the appellant excepted; and the appellant moved for judgment on the issues joined upon which all the evidence in the cause was heard. This motion was overruled, and the appellant excepted.

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It is shown by the bill of exceptions that at the making of the opening statement, the answer was spoken of as a general denial, and "that the court understood that the answer was a general denial, and the instructions, except to a few near the close, were written, describing the answer as a general denial; that earlier in the case, the plaintiff asked in writing several instructions in which the court was asked to charge, in several of the charges, matters that were not necessary unless the answer was a general denial."

We are unable to see in all this any error for which the judgment should be reversed. It appears that the trial had proceeded upon the assumption of counsel that the answer was one of general denial, and, so far at least as the court and jury were concerned, upon the understanding that it was such an answer. In rendering the verdict, the jury, resworn, applied the evidence which they had heard to the issues formed by the pleadings as amended.

An amendment of the pleadings upon the trial necessitates a reswearing of the jury only where the issues are changed by the amendment. *Rogers v. State, ex rel.*, 99 Ind. 218; *Knowles v. Rexroth*, 67 Ind. 59.

The court, considering that by the filing of the amended answer the issues on trial were changed, caused the jury to be resworn.

There does not appear to have been any application for a continuance, nor was there any showing that the appellant was misled or prejudiced, but the indications are strongly to the contrary. There was no refusal to permit the introduction of additional evidence, and none was offered.

It must be held that it was within the discretion of the court to permit, upon the trial, the amendment of

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the answer, in the absence of a showing that the plaintiff was misled or prejudiced, and in what respect. See sections 394-399, Burns' R. S. 1894 (391-396, Horner's R. S. 1897); *Taylor v. Dodd*, 5 Ind. 246; *Koons v. Price*, 40 Ind. 164; *Burr v. Mendenhall*, 49 Ind. 496; *Hay v. State, ex rel.*, 58 Ind. 337; *Durham v. Fecheimer*, 67 Ind. 35; *Leib v. Butterick*, 68 Ind. 199; *Child v. Swain*, 69 Ind. 230; *Town of Martinsville v. Shirley*, 84 Ind. 546; *McMillan v. Bond*, 92 Ind. 424; *Smith v. Flack*, 95 Ind. 116; *Chicago, etc., R. W. Co. v. Jones*, 103 Ind. 386; *Judd v. Small*, 107 Ind. 398; *Burns v. Fox*, 113 Ind. 205; *Stanton v. Kendrick*, 135 Ind. 382; *Fargo & Co. v. Cutshaw*, 12 Ind. App. 392.

All other questions argued are dependent upon a bill of exceptions, which does not properly appear to have been filed, and which therefore cannot be regarded as constituting a part of the record. *Miller, Admx., v. Evansville, etc., R. R. Co.*, 143 Ind. 570; *Beatty v. Miller*, 146 Ind. 231; *DeHart v. Board, etc.*, 143 Ind. 363; *Board, etc., v. Huffman, Admr.*, 134 Ind. 1; *Gish v. Gish*, 7 Ind. App. 104. The judgment is affirmed.

PHARES v. THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY.

[No. 2,291. Filed April 26, 1898.]

COMPROMISE AND SETTLEMENT.—*Construction of Agreement.*—*Personal Injury.*—*Railroads.*—Where a railroad employe made a written proposition to the company in settlement of a claim for an injury sustained by him while in the employ of the company, containing a stipulation, "I am to remain in the service of said company as brakeman as long as I want to, providing my work shall prove satisfactory," and subsequently signed a release which the company's claim agent presented to him in which it was provided that he was to be employed "for such time only as may be satisfactory to said company," it will be presumed, in the absence of any showing of fraud or mistake, that claimant consented to such variance. pp. 55-61.

CONTRACTS.—*Construction.*—*Master and Servant.*—Where a railroad

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company in consideration of a release of liability for injuries sustained by an employe, agreed to re-employ him as a freight brakeman, he having been formerly employed as an extra freight brakeman, and he rendered services as such extra brakeman during the re-employment, the contract to re-employ is properly construed by considering the nature of the previous employment and the manner in which the parties treated the contract. p. 61.

From the Elkhart Circuit Court. *Affirmed.*

Henry C. Dodge, for appellant.

Francis E. Baker and *Charles W. Miller*, for appellee.

BLACK, J.—The court rendered judgment for the defendant upon a special verdict in an action brought by the appellant against the appellee. The controlling facts of the lengthy special verdict were as follows: The railroad company had two classes of freight brakemen, one called regular freight brakemen, and the other extra freight brakemen. The appellant entered the service of the appellee on the 6th day of September, 1892, and during all the time of his service was an extra freight brakeman. He suffered a personal injury while in such service, on the 29th of October, 1892. On the 25th of March, 1893, the appellant signed a writing, referred to in the special verdict as a proposition and as a written option and as an offer of compromise, as follows: "Elkhart, Indiana, March 25, 1893. For and in consideration of the sum of one dollar, to me in hand this day paid by the Lake Shore and Michigan Southern Railway Company, I hereby stipulate and agree to and with the said company that I will accept from it the sum of three hundred dollars, and further that I am to remain in the service of said company as brakeman as long as I want to, providing my work shall prove satisfactory to said company, as full settlement and satisfaction of all claims and demands of every kind, nature and description, which

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I have or may be entitled to have against said company by reason of personal injuries sustained by me while a freight brakeman of said company, at or near Dune Park Station, in the State of Indiana, on the 29th day of October, 1892, and in consideration thereof to execute and deliver to said company a full, perfect and complete release and satisfaction, provided the same is paid to me within forty-five days from the date hereof.

W. H. Phares. (Seal.)

"Witnesses: C. A. Theis, C. C. Needham.

"Elkhart, Indiana, March 25th, 1893.

I, the aforesaid W. H. Phares, do hereby acknowledge receipt from the Lake Shore and Michigan Southern Railway Company, by the hands of C. C. Needham, its agent, the said sum of one dollar mentioned in the above agreement.

W. H. Phares.

"Witnesses: C. A. Theis, C. C. Needham."

On the 10th day of May, 1893, the appellant signed a writing as follows:

"Form No. 1284.

"Whereas, on the 29th day of October, A. D. 1892, the undersigned, while in the employ of the Lake Shore and Michigan Southern Railway Company as freight brakeman, received certain injuries as follows, to wit: While uncoupling engine, had his left hand caught between pin and end sill of car C. L. & W. 3718, one finger amputated and another bruised, while in the discharge of his duties, at or near Dune Park Station, in the State of Indiana; and whereas, I, the said William H. Phares, believe that my said injuries are the result of the negligence of said railway company, its officers, agents and employes; and whereas the said railway company denies any and all negligence on the part of itself, its officers, agents, and employes, and denies any and all liability to me for damages for the injuries so as aforesaid by me sustained; but by reason of an

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offer of compromise made by me, the said L. S. & M. S. Ry. Co., for the purpose of avoiding litigation, to receive and accept the sum of three hundred dollars in full accord and satisfaction for all claims for damages which I may or might have for the injuries aforesaid, have paid to me the sum of three hundred dollars and agree to re-employ me as a freight brakeman for such time only as may be satisfactory to said company. Now, therefore, in consideration of the premises, and the payment to me of the aforesaid sum of three hundred dollars, the receipt whereof I do hereby acknowledge, I do hereby release and forever discharge the said Lake Shore & Michigan Southern Railway Company and all other parties in interest, of and from all actions, suits, claims, and demands for or on account of or arising from the injuries so as aforesaid received, and every and all results hereafter arising therefrom.

"Witness my hand and seal, at Elkhart, Indiana, this tenth day of May, A. D., 1893.

"William H. Phares. (Seal.)

"Signed, sealed and delivered in presence of C. C. Needham.

J. W. Gainard.

"Lake Shore and Michigan Southern Railway Company, to William H. Phares, Dr. Issued April 28, 1893, care of A. B. Newell, Chicago, Ill. For settlement in full of all claims and demands to date, especially for personal injuries sustained at Dune Park, Indiana, October 29th, 1892, as per attached form G. S. 1284. \$300.00.

"Received, Elkhart, May 10th, 1893, of the Lake Shore and Michigan Southern Ry. Co., three hundred dollars in full of the above account.

"\$300.00.

William H. Phares.

"Correct. W. H. Cahniff, Gen. Sup't.

"Audited. C. P. Lehand, Auditor.

"Approved. P. P. Wright, Ass't Gen'l Manager."

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On the 25th of March, 1893, and during the whole of that month, and on the 10th day of May, 1893, and during the whole of that month, the appellant was employed by the appellee as an extra freight brakeman; and from the time of his first employment down to the 26th of June, 1894, whenever he was called upon to do work, he was put upon the appellee's pay roll of extra freight brakemen, and he received pay as such. At the date last mentioned, the appellee put in force a seniority list of all brakemen, whereby those in the appellee's service for the shortest time were put upon the list of extra freight brakemen, and the youngest of the extra freight brakemen in the service, to the number of ten, were temporarily laid off until business should revive. From that date to the commencement of this action the appellant's name was kept upon the list of extra freight brakemen who were so laid off, to be called into service as extra freight brakemen according to their seniority of service whenever business should revive so as to give them active employment. •

It was found that the offer of compromise referred to in the writing of May 10, 1893, was the same offer of compromise contained in the writing of March 25, 1893; that this offer of March 25, 1893, was accepted by the appellee by C. C. Needham, claim agent, before the execution of the written release and written receipt dated May 10, 1893; that said Needham agreed with the appellant that the terms regarding appellant's employment contained in the written option of March 25, 1893, should be embodied in the written papers dated May 10, 1893, which were signed by the appellant.

It was also found that the appellee, on or about the 10th of May, 1893, accepted a proposition made by the appellant in said writing dated March 25, 1893,

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and paid him \$300.00; that the general officers of the appellee sent the release and receipt both dated May 10, 1893, to Needham, to be signed by the appellant; that after the execution of the writings dated May 10, 1893, no new or different arrangement regarding the appellant's employment was entered into between the parties.

It was further found that the principal and most valuable consideration in said compromise and agreement was the agreement by the appellee to furnish the appellant employment as brakeman as long as he wanted it and gave satisfaction in his work; that at all times from the 10th of May, 1893, until the bringing of this suit he was ready and willing to perform the duties of freight brakeman in the service of the appellee, and to give satisfaction therein, whenever the appellee would permit him to perform said work, and he went to the appellee, its officers and agents repeatedly, asking permission to work for the appellee as a freight brakeman, which he offered to do to the satisfaction of the appellee; that the appellee did not furnish him work as freight brakeman from the time of said compromise settlement until the trial, to exceed an amount (which it paid) of \$173.90; that his service as a freight brakeman was worth \$50.00 per month from May 10, 1893, to October 23, 1894 (the commencement of the action), and to March 16, 1896 (the time of the trial); that in August, 1895, he rented a farm for two years; that he used diligence in trying to obtain employment, etc., and had been able to earn in the aggregate ten dollars per month during the period between May 10, 1893, and the trial; that his loss and damage by the reason of the failure of the appellee to employ him as a freight brakeman for the remainder of the time for which he wanted said employment after the date of the trial would be one dollar.

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While the proposition for compromise given by the appellant to the claim agent on the 25th of March, 1893, contained a stipulation on the part of the appellant, that "I am to remain in the service of said company as brakeman as long as I want to, providing my work shall prove satisfactory to said company." the written instrument containing the release sent by the appellee through the claim agent in response to the appellant's proposition, and containing a reference thereto, to be signed by the appellant, and by him signed, bearing date of May 10, 1893, did not contain such a stipulation or provision, but, instead of it, provided that the appellee agreed "to re-employ me as a freight brakeman for such time only as may be satisfactory to said company."

The claim agent agreed with the appellant that the contract releasing the appellee should contain such a provision concerning the employment of the appellant as that contained in the appellant's proposition, but when the release came from the general officers to the claim agent to be signed by the appellant, and the money consideration was paid, and the release was finally executed, it did not correspond with appellant's proposition and the claim agent's promise.

There is no finding of any mistake or of fraud or fraudulent conduct, no indication that the appellant did not know the contents of the papers which he signed, dated the 10th of May, 1893, which is the date throughout the verdict referred to as the time of the acceptance of the offer of compromise by the appellee and as the date of the settlement between the parties. The contents of this instrument of release clearly indicated to the appellant that his proposition was not accepted as to all its stipulations by the appellee, and that it would settle upon different terms as set forth in the form of release sent by the general officers. As

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to the final agreement of settlement, there can be no doubt that it was contained in the paper dated the 10th of May, 1893. So far as it differed from the written proposition of the appellant or the oral promise of the claim agent, the appellant must be deemed to have consented to such variance when, without fraud or imposition, which cannot be presumed, he accepted the money and attached his signature. No ground for the reformation of the contract appears, if such had been the purpose of the action.

The appellant was paid a specified sum for his services rendered after the compromise. They were all rendered in the capacity of an extra freight brakeman. It does not appear that this sum was not full payment for the services actually rendered. If he had been employed as a regular freight brakeman he would have earned a larger sum. But the appellant had been employed only as an extra freight brakeman up to the time of his injury, and he served and was paid in that capacity after the compromise. The contract to re-employ him as a freight brakeman is properly construed by considering the nature of his previous employment, and by looking to the manner in which the parties freely treated the contract and acted upon it, the appellant serving as an extra, and accepting pay as such. The judgment is affirmed.

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[No. 2,446. Filed April 26, 1898.]

EVIDENCE.—*Weight Of.*—Where there is some evidence to support the judgment the Appellate Court will not reverse the judgment on the ground that it is not sustained by the evidence. pp. 62, 63.

WITNESSES.—*Expert Testimony.*—*Discretion of Court.*—The extent of a witness' knowledge before being permitted to testify as to the value of mill machinery is within the discretion of the trial court, and it is only where there is a total lack of such knowledge, or

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there is a palpable abuse of such discretion, that the appellate tribunal will interfere. *p. 63.*

WITNESSES.—Evidence.—Expert Testimony.—Competency.—The extent of a witness' knowledge of the subject-matter about which he testifies as to values goes to the weight of his testimony, and not to its competency. *p. 63.*

EVIDENCE.—Receipt.—May Be Explained by Parol Evidence.—A receipt which has none of the elements of a contract is only *prima facie* evidence of the statements it contains, and may be explained or contradicted by parol evidence. *p. 63.*

SAME.—Sales.—Statement of Parties at Time of Sale Part of Res Gestæ.—Replevin.—In an action in replevin, where both parties claimed the property under a sale, and a receipt was introduced in evidence to show a sale to one of the parties, the statements of the parties made at the time the sale was made and the receipt was executed were competent evidence as a part of the *res gestæ*. *pp. 63, 64.*

SAME.—Admissibility.—Sales.—In an action to replevin mill machinery, where both parties were claiming the property under a sale thereof, a deed purporting to convey the real estate and mill property in which was situated the machinery in dispute, and the record of the circuit court quieting the title to the same property were properly admitted in evidence as bearing on the question of the ownership of the property in dispute. *p. 64.*

From the Parke Circuit Court. *Affirmed.*

S. D. Puett, John S. McFaddin, A. C. Ayres, A. Q. Jones and Caroline B. Hendricks, for appellants.
J. M. Johns, for appellees.

ROBINSON, C. J.—Appellants brought suit in replevin for certain mill machinery, and for damages. Judgment was rendered in appellees' favor. Appellants' motion for a new trial was overruled, and this ruling is the only error assigned. A new trial was asked, because the decision was not sustained by sufficient evidence, was contrary to the evidence and the law, and because of the admission of certain evidence set out in the motion.

It is not claimed that there was a failure of proof upon any material issue in the case. We have carefully considered the evidence, and find there was some evidence upon which to base the finding. It has been

so often held that the preponderance of the evidence is a question for the jury or trial court that the citation of authorities to that effect is unnecessary.

The fourth and sixth grounds for a new trial were, permitting two witnesses to testify as to the value of certain machinery. It is not necessary that a witness should be an expert before testifying in such a case. The extent of a witness' knowledge before being permitted to testify as to values is within the discretion of the trial court, and it is only where there is a total lack of such knowledge, or there is a palpable abuse of discretion, that the appellate tribunal will interfere. It is shown the witnesses had some knowledge of the subject-matter, and of the particular property. The record shows they were competent to testify, the weight of their testimony was for the court.

The extent of a witness' knowledge of the subject-matter about which he testifies as to values, goes to the weight of his testimony and not to its competency. See *Smith v. Indianapolis, etc., R. R. Co.*, 80 Ind. 233; *Terre Haute, etc., R. R. Co. v. Crawford*, 100 Ind. 550; *City of Lafayette v. Nagle*, 113 Ind. 425.

A receipt that has none of the elements of a contract, may be explained or contradicted by parol evidence. It is only *prima facie* proof of the statements it contains, and is not conclusive. *Ohio, etc., R. W. Co. v. Crumbo*, 4 Ind. App. 456, and cases cited; *Adams v. Davis*, 109 Ind. 10; *Scott v. Scott*, 105 Ind. 584.

A receipt was in evidence to the effect that the property in suit was sold to one of the appellees on March 13, 1895, by one Ekelsberry. Appellants were claiming the property by purchase from the same party, at a subsequent date. What the parties said at the time of the transfer on March 13, concerning the sale, and the amount paid, was competent evidence as a part of the *res gestae*. While it is well

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settled that a party to a suit cannot prove his own declaration, made in the absence of his adversary, to sustain his cause of action; yet the rule is declared to be that "Where an act is competent, so, also, are the declarations of the persons engaged in its performance and constituting a part of the thing done." *Pennsylvania Co. v. Weddle*, 100 Ind. 138; *Walker v. Steele*, 121 Ind. 436; *Creighton v. Hoppis*, 99 Ind. 369.

There was no error in admitting in evidence a deed purporting to convey to appellee Cox the real estate and mill property in which was situated the milling property in dispute, and also the record of the circuit court quieting title to the same property. We are not informed how such evidence could harm appellants. We think it would tend to show who was entitled to the possession of the mill property, and would have some bearing on the question of title to the personal property. Upon the whole record, we can but conclude that the case was properly decided upon its merits. Judgment affirmed.

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[No. 2,787. Filed April 26, 1898.]

CRIMINAL LAW.—*Appeal*.—*Bill of Exceptions*.—Under the provisions of section 1916, Burns' R. S. 1894, the bill of exceptions in a criminal cause must be made out and presented to the judge and filed within sixty days from the rendition of the judgment, and if not filed within such time it is not a part of the record on appeal, although ninety days' time was given by the trial court for the preparation thereof. p. 65, 66.

SAME.—*Obstructing Highway*.—*Punishment*.—A fine of twenty-five dollars for obstructing a public highway is not excessive. p. 66.

From the Pulaski Circuit Court. *Affirmed*.

Warren W. Borders and Burlingame Borders, for appellant.

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W. A. Ketcham, Attorney-General, and *Merrill Moores*, for State.

COMSTOCK, J.—This is a criminal prosecution for the obstruction of a public highway. Upon trial appellant was found guilty, and fined twenty-five dollars. The only error assigned in this appeal is the action of the lower court in overruling his motion for a new trial. Three reasons are specified in said motion: (1) The verdict is not sustained by sufficient evidence; (2) the verdict is contrary to law; (3) the fine is excessive.

The only questions discussed in appellant's brief depend upon the evidence. The Attorney-General, for the State, contends that there is no evidence before this court, and therefore the questions raised cannot be considered.

An examination of the record discloses that on the 6th day of October, 1897, appellant's motion for a new trial was overruled, exceptions taken, and ninety days time given in which to file a bill of exceptions, and that on the same day judgment was rendered on the verdict.

The longhand manuscript of the stenographer's notes of the evidence was filed in the office of the clerk on the 9th day of December, 1897, and was certified by the judge as the general bill of exceptions on the 11th day of December, 1897, and ordered to be made a part of the record.

Section 1916, Burns' R. S. 1894 (1847, Horner's R. S. 1897), reads as follows: "All bills of exceptions, in a criminal prosecution, must be made out and presented to the judge at the time of the trial, or within such time thereafter as the judge may allow, not exceeding sixty days from the time judgment is rendered; and they must be signed by the judge and filed by the clerk."

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It has been held by the Supreme and this court that, under this section of the statute, a bill of exceptions not filed within sixty days after the rendition of judgment is not in the record. *Houston v. State*, 15 Ind. App. 424; *Marshall v. State*, 123 Ind. 128; *State v. Hunt*, 137 Ind. 537; *Bruce v. State*, 141 Ind. 464.

As, under the statute, the jury were authorized to assess as a punishment a fine not exceeding \$500.00 to which they might add imprisonment in the county jail for any period not more than three months nor less than ten days, we cannot say that the punishment was excessive. Section 2043, Burns' R. S. 1894 (1964, Horner's R. S. 1897).

The bill of exceptions was filed too late. Judgment affirmed.

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[No. 1,756. Filed April 27, 1898.]

APPEAL AND ERROR.—*Waiver of Error.*—Errors assigned in this court and not discussed are waived. pp. 74, 75.

CONTRACTS.—*Consideration.*—*Moral Obligation.*—The moral obligation of a purchaser of coal to protect the barges of the vendor from ice is a sufficient consideration to support an express promise to protect the barges. pp. 77-79.

SAME.—*Consideration.*—Defendant purchased of plaintiff twenty barges of coal. Plaintiff shipped ten barges thereof and refused to ship the remainder unless defendant would protect the barges from the danger incident to the flow of ice. Defendant accepted the proposition, and agreed to the terms imposed. *Held*, that the promise to protect the barges was supported by a sufficient consideration. pp. 67-80.

SAME.—*New Promise.*—Where plaintiff refuses to carry out his part of a contract unless certain changes are made therein, and defendant, instead of bringing an action for damages for its breach, agrees to the new terms imposed, and each of the parties act upon it, such agreement is binding upon defendant. p. 80.

PRACTICE.—*Motion to Paragraph Complaint.*—Overruling a motion to require plaintiff to state different causes of actions in separate paragraphs of complaint is not available error. p. 80.

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DEMURRAGE.—Damages.—Demurrage is a proper element of damage for the consideration of the jury in an action for injury to barges. *pp. 82, 83.*

From the Vanderburgh Superior Court. *Affirmed.*

J. E. Williamson, for appellants.

Garvin & Cunningham, for appellees.

WILEY, J.—Appellants were coal merchants at Peoria, Illinois, with a branch office at Evansville, Indiana. Appellees were coal miners and merchants at Pittsburgh, Pennsylvania, and sold a large quantity of coal to appellants, to be delivered to them at Evansville. The coal so sold was to be shipped to appellants in barges *via* the Ohio river, and to be delivered at such time or times as the stages of the river would permit. A tow of ten barges of coal was delivered in June, 1891, which was received and paid for by appellants. It was contended by appellees that on account of the low water in the river, they were unable to ship the remaining ten barges until December following. They were shipped then, and appellants paid for them within the time agreed upon. While the barges were in the possession of appellants for unloading, etc., the river became blocked with ice, and when the ice broke and began to flow, some of the barges were sunk, and others carried away and injured. It is claimed by appellees that the appellants agreed, in case of danger from ice, that they would, at their own expense, tow the barges, both loaded and empty, to the mouth of Green river, a short distance above Evansville, and keep them harbored there until all danger from ice had passed, when they would tow them back to Evansville and unload them, so appellees could take them back to Pittsburgh. It is charged that they wholly failed to do this, but suffered them to remain at Evansville during the ice season, whereby they were damaged, two of them sunk and wholly lost. It is further claimed

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that appellants agreed to unload the barges within a reasonable time, so that appellees could get the empties and tow them back for use; but that they kept them for an unreasonable time, and kept appellees out of the use of them, and that by reason thereof they were entitled to demurrage.

It is also further claimed by appellees that after appellants unloaded two of the barges, they used them in their own business, thereby depriving appellees of the use thereof, and that the use of them was worth \$5.00 each per day.

Appellees brought their action therefore to recover damages, (1) For injury to their barges, caused by the ice, on account of the alleged negligence of appellants in failing to tow them to Green river; (2) for demurrage, for delay in unloading the barges, and (3) for the reasonable hire of the barges while they were in the alleged use of appellants.

The complaint was in three paragraphs, and is very voluminous. As no question is presented as to the sufficiency of the complaint, it is unnecessary to set it out at any great length. The complaint avers that the negotiations between appellants and appellees, relating to the sale and purchase of the coal, were partly oral and partly by letters and telegrams.

In the amended first paragraph of the complaint, it was alleged that the contract was contained in the correspondence had between them, and then follows all the correspondence relating to the transaction, copied bodily as a part of the complaint. It is enough to say that it clearly appears from this correspondence, that appellants agreed in case of danger from ice while the barges were in their possession, that they would tow the entire fleet to Green river and harbor it there till all danger had passed. It also shows that appellees refused to ship the last tow of ten barges, unless

appellants agreed to protect them from the danger of ice, as above indicated. It is then charged that between the time of the shipment of the first and second fleet of barges, it became apparent to both parties that danger from ice was likely to occur before the barges could be delivered and unloaded; that it was agreed that appellants would take charge of the barges on their arrival at Evansville and use all proper skill in the management thereof; that they would unload the same expeditiously and within a reasonable time; that they agreed to be responsible for any damages resulting to the barges by reason of their neglect, or by reason of their failure to tow them to Green river. It is further averred that said coal was delivered to appellants upon the express conditions and agreements contained in said letters. This paragraph avers that appellees performed all the conditions to be performed by them, but that appellants failed to perform the conditions on their part, in that they did not unload said barges in a reasonable time, whereby appellees were deprived of their use for several months; that appellants took two of the barges and had them towed to distant points to be loaded with coal purchased of other parties; that when said barges were received at Evansville, the appellants placed them in charge of an agent who was grossly careless and ignorant in the management thereof; that for several days prior to January 18, 1892, there were at Evansville eight of appellees' barges in the possession of appellants; that for several days prior to said date, ice had been running in the river, and it became dangerous to leave boats and barges in the river at that point; that the appellants, knowing all the facts, wholly failed and refused to have said barges towed to Green river, or any place of safety; that they caused said barges to be placed along the bank of the river, at a dangerous

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point and in a grossly careless and unsafe manner; that by reason thereof, and without any fault or negligence of appellees, six of said barges were, on January, 1892, torn from their moorings by the ice; that two of said barges of the value of \$300.00 were sunk and totally lost; that the remaining ones were carried many miles down the river, and greatly damaged; that appellees recovered them at great expense, and expended large sums of money in their repair; that the barges that were not swept away were greatly damaged; that they were deprived of their use for many weeks, to their damage, etc.

In the second paragraph of complaint it is averred, among other things, that in conversation between appellees and one of the appellants representing the appellants at Pittsburgh, Pennsylvania, it was expressly agreed upon receipt of the coal by the appellants, that they would unload it expeditiously and within a reasonable time, and have barges ready to return before there was any danger of ice, and that it was expressly agreed and understood between them, that if the coal was shipped by appellees to appellants, their barges should be fully protected from ice; that such conversation was had on or about April 4, 1891, and that the negotiations that then took place were merely preliminary, and that the contract and sale of delivery of the coal was subsequently completed by letters and telegrams; that early in June, 1891, the appellees shipped a fleet of ten barges, and the last ten barges were not delivered until about December 1, 1891, and that prior to the last shipment, appellants expressly agreed by letter that in case of any danger from ice they would have the whole fleet of barges unloaded and empty, towed to Green river at their own expense, and harbored until danger of ice was passed.

The third paragraph of complaint is, in all material

respects, substantially like the second, and differs from it only in that it sets out at length all correspondence and telegrams between the parties relating to the matters in controversy.

Appellants moved the court in writing to require the appellees to separate their complaint into three paragraphs, which motion was overruled, and appellants excepted. Appellants thereupon filed an answer in seven paragraphs, and a counterclaim in one paragraph. After the filing of these answers and counterclaim, appellees filed an amended first paragraph of complaint, to which appellants filed an answer in one paragraph. The appellees demurred to each paragraph of the affirmative answer, which demurrer was sustained as to the second, third, fourth, fifth, and seventh, and overruled as to the sixth, and appellees' demurrer to the appellants' answer to the amended first paragraph of the complaint was also sustained.

It is unnecessary for us to refer to the issues joined as to appellants' counterclaim, or any of the paragraphs of answer, except as to the second, for all questions arising thereunder are waived by a failure to discuss them.

In the second paragraph of answer, which purports to be an answer to the entire complaint, it is averred that the appellants and appellees entered into negotiations for the sale and delivery of coal mentioned in the complaint; that said negotiations on the part of the appellants were had with the appellant Pierce, at conclusion of which negotiations, he made a memorandum entry in his book as follows: "You are to put the coal along side at Evansville at lots of twenty barges each, at eight cents per bushel, of seventy-six pounds per Louisville gauge, first and second pools screened over one and one-half inch screen. Price

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good for any contract, provided we wire you before selling twenty barges; price to be reduced to correspond. Walton to fill within about two weeks of receipt. Payment to be made upon receipt of coal in sixty days, without interest."

It is then alleged that said Pierce would return home in about ten days, and determine whether he would enter into a contract for the purchase of coal. On April 15, appellants addressed a letter to appellees in which they said: "Since our Mr. Pierce saw you in Pittsburgh we have decided positively to engage in the gas and coal business *via* Evansville. We would like to have you send us an analysis of your coal by return mail, and also advise us whether the memoranda of arrangement with you for supply, which is as follows, agrees with your memoranda of the same to wit:" (Then follows the memoranda above set out.) Then occurs the following: "We think this covers all the points talked of, but if not, we would like to be advised fully of any difference before getting too large a tonnage contracted for." On the 18th of April, appellees replied to appellants, and said:

"We are just in receipt of your favor of 15th inst., and in reply would state that since your Mr. Pierce was here matters have developed in the mine question that may materially interfere with our ability to furnish said coal, and presume you have noticed in the papers the excitement about the eight-hour question. We would therefore suggest that you go a little cautious until the matter is determined, for even if the miners do not strike, we could not possibly send you a tow until latter part of May, and, under existing circumstances, we would not agree to furnish more than one tow of twenty barges at eight cents per bushel. But if you want the tow, and give us the order, we will not go back on our offer, and will send

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you twenty barges just as soon as we can. . According to your memoranda of the conversation the time mentioned by you is sixty days, which you are to have without interest, provided your credit was satisfactory, which, by the way, we have not yet made inquiry about, but which we shall take the necessary steps to do at once. Enclosed find analysis of second pool coal." The answer then avers that by the terms of the said letters which constitute the entire contract between appellants and appellees touching the matters in controversy, that appellees agreed to fill the order according to the terms mentioned in the letter of April 15, and that no other different contract was made between them.

The answer then refers to the letters dated November 17, and 19, 1891, written by appellees to appellants, and the answer thereto, quoting from each of them, and it is admitted that the appellants made the promise or agreement contained in the letters referred to, but say said promise was made without any consideration paid, or agreed to be paid. The answer then contains the following averments: "Defendants plead the want of consideration as a defense to all that part of plaintiffs' complaint which seeks to recover for the loss of the barges and the repair of those not lost, and all other matters and things growing out of the failure on the part of the defendants to remove said barges to Green river, and any and all things which happened to said barges in consequence of such failure. As to that part of the plaintiffs' cause of action wherein they seek to recover on the items in the demurrage of their complaint, the defendants say that they never at any time agreed with plaintiffs to pay demurrage, and that by the customs of the port at Evansville, of long standing and immemorial usage, and of universal application, no

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demurrage is ever paid for delay in loading and unloading vessels or barges or any other water transports. As to the item in the complaint set out which seeks a recovery for the use by the defendants in and about their business of the two barges, the property of the plaintiffs, the defendants deny they ever in any manner used any of the plaintiffs' barges.

Upon the issues thus joined, the cause was tried by a jury, and a general verdict for appellees, and with the general verdict, the jury answered and returned certain interrogatories submitted to them. Appellants' motion for a new trial was overruled, and judgment was rendered on the verdict.

The errors assigned in this court are as follows: (1) Error of the court in sustaining plaintiffs' demurrer to the second paragraph of defendants' answer; (2) error in overruling defendants' motion requiring plaintiffs to paragraph their complaint; (3) error in sustaining plaintiffs' demurrer to the third paragraph of defendants' answer; (4) error in sustaining plaintiffs' demurrer to the fourth paragraph of defendants' answer; (5) error in sustaining plaintiffs' demurrer to the fifth paragraph of defendants' answer; (6) error in overruling defendants' demurrer to plaintiffs' answer to defendants' counterclaim; (8) error in sustaining plaintiffs' demurrer to the sixth paragraph of answer; (9) error in overruling defendants' demurrer to plaintiffs' answer to defendants' cross-complaint; (10) error in sustaining plaintiffs' demurrer to the second paragraph of defendants' answer to the amended first paragraph of plaintiffs' complaint; (11) error in sustaining the plaintiffs' demurrer to the third paragraph of defendants' answer to the amended first paragraph of plaintiffs' complaint; (12) error in overruling defendants' motion for a new trial.

We will only consider the questions discussed, as all

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others are waived. The first alleged error discussed is the sustaining the demurrer to the second paragraph of appellants' answer. To determine properly the question thus presented, it is necessary to state as briefly as possible the substantial averments of the answer. It is the theory of the answer that the contract for the sale and purchase of the coal was consummated by letters and telegrams, and that such letters and telegrams constituted the whole contract. The answer avers that on April 4, 1891, appellants and appellees entered into negotiations for the sale and delivery of the coal mentioned in the complaint; that said negotiations were originally by parol, at an interview between appellees and Wilbur L. Pierce, one of the appellants; that at the conclusion of said interview said Pierce made in writing, in a book, the memoranda above set out. The answer further alleges that the appellant Pierce, who conducted the negotiations, agreed with the appellees that he would return home, and in about ten days would definitely determine whether he would enter into a contract for the purchase of the coal; that after returning home, namely, on the 15th of April, 1891, he addressed to the appellees a letter, in which it was stated that appellants had decided to engage in the gas coal business, and copied in the letter the memoranda made by Pierce above quoted. The letter concluded as follows: "We think this covers all the points talked of, but if not we would like to be advised fully of any difference, etc." It is then averred that appellees responded to this letter, in which they agreed to ship the coal according to the memoranda referred to, but could not make a shipment before the latter part of May. To this letter was a postscript, as follows: "P. S. According to your memorandum of the conversation, the time mentioned by you is sixty days, which

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you were to have without interest, provided your credit was satisfactory, which, by the way, we have not made inquiry about, but which we shall take necessary steps to do at once."

The answer then charges that by the express language of this letter, appellee agreed to fill the order according to the terms of the letter of April 15, from appellants to appellees, and that these letters constituted the entire contract between the parties. It is further averred that on June 17, 1891, appellees delivered to appellants ten barges of coal, and that the remaining ten barges were not delivered until December; that the delay in the last shipment was caused by low water in the river.

In November there was some further correspondence between the parties, in which the possible danger to the barges from ice was discussed, and the appellants thereby agreed that when the second tow of ten barges arrived they would protect them from the danger of ice. On November 17, 1891, appellees wrote a letter to appellants in regard to the shipment of the last ten barges, in which they discussed the danger from ice, and made certain suggestions in regard to protecting the barges in case of ice, and that they should be towed to Green river in case of danger. In that letter appellees, among other things, said:

"We think this is a good proposition, and that you should accept it, as, unless we have some assurance of this character that our barges will be protected, we shall positively decline to send them during the ice season."

To this letter appellants replied on November 19, in which they said: "Regarding manner of handling next ten barges, would say that we had figured on the safety of the new fleet in case of ice, as follows: Our agent is a very careful man, and quick to act in emer-

gencies, so we think as we are not absolutely certain to be troubled with ice, we would let the ten barges come through to Evansville and unload eight of them at the rate of two barges per week, and hold two barges for emergencies. Then in case of any ice (of which we would of course have ample warning) we would have the whole fleet, loads and empties, towed to Green river at our own expense, and then bring down again the loaded barges two at a time when it was safe to do so."

These letters are set out in full in the answer, as well as the original correspondence. While the answer admits the promise or agreement on appellants' part to protect the barges from ice, it is earnestly contended that such agreement was without any consideration whatever, and therefore could not be enforced. It is upon this ground that counsel for appellants contend that the demurrer to the answer should have been overruled.

It will be observed from the pleadings, and the correspondence which enters so largely into them, that appellees were to ship the coal at such time or times as the water in the Ohio river would permit, and that after the shipment of the first tow of ten barges in June, the stage of the water was such that the second shipment could not be made until December. At that time there was both possible and probable danger from ice, which fact was recognized by appellees and appellants. As to this fact there is no controversy. Recognizing this fact, appellees positively declined to ship the second fleet until assured by appellants that every precaution would be taken to protect the barges, and if necessary they would tow them to Green river, etc. Appellants say that they would have ample warning of approaching danger, and the complaint avers that they did have such

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warning. Regardless, however, of such warning, and in violation of their express promise or agreement to protect the barges, they failed and refused to tow them to Green river, or otherwise protect them, but suffered them to remain in a dangerous and unprotected place, by reason of which some of them were sunk and wholly lost, and others damaged and carried away, etc.

Regardless of the facts charged in the complaint and answer, appellants were under both a legal and moral obligation to use all reasonable means, and to exercise all reasonable diligence and precaution, commensurate to the apparent and known danger, to protect the barges, and if necessary to such protection to have them towed to Green river, which was, as all the facts show, a safe and certain harbor.

The barges were in the possession of the appellants; they had complete control over them, and it was their highest duty to use at least ordinary care and diligence in protecting them from injury. Conceding, that in the original contract between appellants and appellees, there was no express promise or agreement to tow the barges to Green river in case of ice, etc., the legal and moral duty resting upon them, as above indicated, was a sufficient consideration to support and maintain their express promise and agreement, made and expressed in their letter of November 19, 1891.

In *Willis v. Cushman*, 115 Ind. 100, it was held that a moral obligation was a sufficient consideration upon which to base a promise, and that such consideration would support such promise. In that case the appellee was indebted to appellants upon a promissory note. He became financially involved, and took the advantage of the bankrupt law. He was finally discharged in bankruptcy, and after such discharge gave

a new note for the same indebtedness. Such discharge operated as an actual extinguishment of the original debt, and the Supreme Court, by Howk, J., said: "But while this is so, plaintiff's discharge in bankruptcy did not pay his debt to Medsker, but left him morally bound to pay such debt if able to do so at some future time. This moral obligation resting on plaintiff constituted a sufficient consideration for the promissory note he executed to Medsker after his discharge in bankruptcy."

In *Wright, Admr., v. Jones*, 105 Ind. 17, it was held that an equitable consideration was sufficient to uphold a contract.

In *Lawson on Contracts*, section 103, it is said: "The doing what one is only morally bound to do, as paying a debt barred by the statute of limitations, is a good consideration for a promise."

In such case the statute relieves the promisor from liability, but does not extinguish the debt, and such obligation is a sufficient consideration for a new promise, if such promise be in writing. This rule is of universal application, and is firmly supported by sound reason and honest fair dealing.

Parsons on Contracts, 434, says: "A moral obligation to pay money or to perform a duty is a good consideration for a promise to do so, where there was originally an obligation to pay the money or to do the duty, which was enforceable at law but for the interference of some rule of law." See, also, *Ferguson v. Harris*, 39 S. C. 323. In the latter case it was held that a moral obligation to pay money or to perform a duty is a good consideration for a subsequent promise to do so, even if there was originally no legal obligation to perform."

But aside from a moral or equitable duty on the part of appellants, the law imposed upon them a legal

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obligation to protect appellees' barges, and such obligations, it seems to us, will support an express promise, and are therefore a sufficient consideration for the agreement made by appellants.

But aside from this there is another principle involved which we think is applicable, and as applied to the facts alleged in the answer, makes it bad. After appellee shipped the first fleet of coal, they absolutely refused to ship the second fleet, unless appellants would agree to protect their barges from the danger incident to the flow of ice. Appellants could have rested upon their original contract, upon this refusal of appellees to perform it, and would have had an action against them for damages for its breach, but instead of that, they accepted the proposition of appellees, agreed to the terms imposed, and each of the parties acted upon it. Under the authorities this was an acceptance of the terms of appellees, and was a sufficient consideration.

The question we are here considering has been decided adversely to appellants' contention, by this court, in *Sargent v. Robertson*, 17 Ind. App. 411. In that case, Black J., collected many authorities and gave a clear and exhaustive discussion, showing the application of the principle, and we now content ourselves by referring to it and the authorities there cited. Our conclusion is that there was no error in sustaining the demurrer to the answer.

At the proper time appellants moved the court in writing to require the appellees to paragraph their complaint, so as to state in different paragraphs the different items claimed. This motion was overruled, and such ruling is assigned as error. If each paragraph of complaint, as appellants contend, contains more than one cause of action, the overruling of their motion to separate was not available error. *Wabash*,

etc., *R. W. Co. v. Rooker*, 90 Ind. 581. See, also, *Equitable, etc., Ins. Co. v. Stout*, 135 Ind. 444; *Smiley v. Deweese*, 1 Ind. App. 211; *Chicago, etc., R. R. Co. v. Wolcott*, 141 Ind. 267. There was no error in overruling this motion.

One reason assigned by appellants in their motion for a new trial was the alleged error of the court in giving and refusing to give certain instructions; and another was the admission and rejection of certain evidence.

A *seriatim* discussion of all the questions thus presented would extend this opinion far beyond any useful purpose.

The record is very voluminous, containing over seven hundred typewritten pages, and we have examined it with very great care. The instructions given by the court to the jury, as applied to the facts disclosed by the evidence, fairly and fully stated the law. The appellants tendered, and requested the court to give certain instructions, which were refused, and of such refusal they complain. We do not think they were thus harmed, for the questions presented in these instructions were substantially covered by other instructions given by the court, except number three, which is as follows: "If you find that the promise contained in any letter written by the defendants to the plaintiffs, by the terms whereof, defendants agreed to remove plaintiffs' barges to Green river, was made after the contract of sale was fully agreed upon by the parties, and that no consideration was agreed upon by the parties to support such promise so contained in such letter or letters, then and in such case such promise would not bind defendants, for the reason that every contract or agreement to be binding in law must rest upon a consideration. And any agreement

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by either to do or perform any act not embraced in the contract, would not be binding, unless supported by a consideration."

As applied to the facts in this case, the instruction above quoted did not correctly state the law. The question of consideration ordinarily is a mixed question both of fact and of law; but where, as in this case, there is no dispute or conflict as to the facts, the question of consideration becomes one of law alone. The court had instructed the jury that in case they found certain facts to exist, referring to the facts upon which appellants' promise or agreement to protect appellees' barges from the danger incident to the flow of ice in the river, by towing them to Green river, such facts would constitute a sufficient consideration to support such promise and agreement.

Appellants admitted the facts appellees alleged and relied upon, and upon such facts, if the jury found them to exist, it was the duty of the court to declare whether or not such facts constituted a sufficient consideration for the promise, etc. This the court did, and the instruction tendered by appellants upon this point was equivalent to instructing the jury to return a verdict for them.

As we have determined that under the facts pleaded there was a sufficient consideration for the promise, the instruction under consideration was rightfully refused. After a careful consideration of appellants' objections to the admission and rejection of evidence, as presented in their motion for a new trial, we are clear that no available error was committed.

Appellants insist that the verdict is wrong because it includes \$1,080.00 damages as demurrage, and under the facts no demurrage was recoverable. In an answer to an interrogatory, the jury fix the amount they find is recoverable as demurrage.

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The pleadings and facts fully warrant such finding. Appellees were kept out of the use of their barges for a long and unreasonable time by the acts of appellants, and this was a legitimate element of damages for the jury to consider. Nor can we say, from the evidence, that the amount fixed is excessive.

Taking the whole record, it seems to us that a right conclusion was reached by the trial court, and there is no error for which the judgment should be reversed. Judgment affirmed.

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[No. 2,426. Filed April 27, 1898.]

EVIDENCE.—The Appellate Court will not reverse a judgment on the evidence where there is evidence sustaining the judgment. *p. 85.*

SAME.—*Harmless Error.*—It is harmless error to refuse the admission of evidence tending to prove matters established by other uncontradicted evidence and shown to exist by the special findings. *pp. 85, 86.*

TRUSTS.—*Advancements.*—*Husband and Wife.*—Where a father made an advancement to his daughter's husband without any intention or agreement of the parties that the money should be repaid to the wife, no trust was thereby created in her favor. *pp. 83-87.*

From the Fountain Circuit Court. *Affirmed.*

Elwood Hunt, George Boswell, J. A. Lindley and O. P. Lewis, for appellant.

A. Marshall & Son and Nebeker & Simms, for appellee.

HENLEY, J.—Appellant was the plaintiff in the lower court, and brought this action against appellee by a complaint in one paragraph in which it is alleged that appellee was at the time of the death of appellant's intestate her husband; that in the month of October, '1876, plaintiff's intestate died, leaving surviving her this appellee, her husband, and five chil-

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dren; that during said marriage appellant's decedent received from her father the sum of \$2,000.00 in property and money as a gift or advancement from her said father; that said decedent being the wife of appellee turned the money and property over to her said husband, and that said appellee received the same from her in trust, and thereupon took said money and used it to purchase lands, taking the title in his own name, and otherwise used said moneys for his own benefit; that appellee has failed and refused to account for said moneys, and appellant demands judgment for the amount with interest. To the complaint stating these facts, appellee filed an answer in two paragraphs. The first was a general denial; the second, that the cause of action did not accrue within six years prior to the commencement of this action. To the second paragraph of answer appellant replied the general denial. There was a trial by the court. Upon request of the appellant the court made a special finding of facts. Upon the facts as found the court stated his conclusions of law, and rendered judgment in favor of appellee, defendant below. The facts as found by the court are substantially as follows: On the 6th day of February, 1862, appellee and appellant's intestate were married and continued to live together as husband and wife until the death of appellee's wife in October, 1876. While said marriage relation existed, the appellee herein received in money and property from his father-in-law the sum of \$1,700.00, which said money and property was delivered by the father-in-law to appellee, and was meant and intended to be appellee's wife's share of her father's estate, and appellee and his wife both knew when the said money and property were so received as aforesaid, that it was meant and intended by the said wife's father as her share in his estate.

The father of appellant's intestate and the father-in-law of appellee was one Joshua Cartright. Appellee received said money and property from Cartright, and did not agree either with him or with appellant's intestate to pay at any time appellant's decedent any part of said money or to turn over to or pay her for any of said property, nor to hold said money or property in trust for her in any form whatever. It was not intended or expected, when said money and property was delivered to appellee, either upon the part of said Cartright or of appellant's intestate, that appellee should pay over to said plaintiff's intestate any part of said money or deliver to or account for to said intestate any part of said property, and it was meant and intended by said Cartright and plaintiff's intestate that appellee should keep and use said money and property as his own.

The facts as above detailed are substantially as found by the court; they are fairly within the issues presented and are sustained by the evidence. The rule that the Appellate Court of this State will not weigh the evidence must be strictly adhered to. A deviation from the firmly established rule would lead to almost innumerable appeals and virtually mean to litigants at least two trials upon the merits of every controversy.

Reasons numbered twelve, thirteen, fourteen, and fifteen of appellant's motion for a new trial, relate to the alleged error of the lower court in excluding certain evidence offered by appellant upon the trial of the cause. If error at all, it was harmless error to refuse that part of the testimony offered by appellant which might have tended to prove that appellee received the moneys herein sued for, because the same facts were established by other and uncontradicted evidence, and its refusal could not have been prej-

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udicial to appellant, besides it is found by the court in the special finding of facts, that the appellee did receive the money from the said Cartright. The other evidence refused was all immaterial, and there was no error in refusing it.

Upon the facts found by the court, the conclusions of law could not have been different. Joshua Cartright had a perfect right to give to appellee, his son-in-law, the money and property in controversy. It was the property of said Cartright, and not the property of appellant's decedent. In the case of *Lewis v. Stanley*, 148 Ind. 351, the Supreme Court of this State, speaking by Howard, J., say: "The father may thus make the advancement in the manner he thinks best, and, even if the daughter should object, still he might, by will or otherwise, thus fix the portion to be given to her. The property belongs to the father to do with as he deems best; and it does not follow because the advancement is so made the land does not belong wholly to the husband. There is nothing in the findings or the evidence to show that any trust in favor of Comfort E. Stanley was created by the deed to her husband." And so in this case, there is nothing in the findings or the evidence to show that the receipt of the money by appellee created a trust in favor of appellant's decedent.

Special finding numbered four is as follows: "The court further finds that there was at the time said money and property was so delivered by said Cartright to the defendant, no expectation on part of either of said Cartright or of plaintiff's intestate that the defendant should pay any part of said money or deliver any part of said property to the plaintiff's intestate. And that it was meant and intended by said Cartright and plaintiff's intestate that the defendant should keep and use said money and property as his own."

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This finding directly negatives the existence or the contemplation of any trust by either of the parties to this transaction. It is a finding made by the trial court in an action begun nearly twenty years after the death of the party in whose interest the trust is sought to be established. We believe the cause was fairly tried and a correct conclusion reached by the lower court. Judgment affirmed.

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RAILWAY COMPANY ET AL. v. THE EDWARD
C. JONES COMPANY.

[No. 2,490. Filed April 28, 1898.]

STREET IMPROVEMENTS.—Assessment Liens.—Foreclosure.—Secondary Liens.—Municipal Corporations.—In an action to foreclose assessment liens for street improvements in order to render lands liable therefor which do not abut on the street improved, as provided in section 4290, Burns' R. S. 1894, it must be shown that the municipality took the statutory steps necessary to fix a lien on such lands. *pp. 88-91.*

SAME.—Compliance with Statute.—Jurisdiction.—Municipal Corporations.—The proceedings of a municipality in making street improvements will not be held void on account of failure to comply strictly with the statute, where the municipality has jurisdiction over the subject-matter and the persons to be affected; but where some act in its nature jurisdictional is required to be done as a condition precedent to imposing such burden, the failure of the municipality to do the act required renders the proceedings void. *p. 91.*

SAME.—Assessment Liens.—Foreclosure.—Complaint.—It is not necessary in an action to foreclose an assessment lien for street improvements that the proceedings of the city council in making such improvements be set out at length in the complaint, but it is necessary to plead the acts done by the municipal officers, and such facts as show that they were rightfully done. *p. 92.*

SAME.—Assessment Liens.—Foreclosure.—Street Improvement Bonds.—The rights of plaintiff in an action to foreclose a lien for street improvements based upon bonds issued for such improvements are no greater than those of the contractor who made the improvements, and any defense defendant would have had in an action by

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the contractor, had he brought the suit, may be interposed in an action on the bonds. p. 92.

PLEADING.—Complaint.—Omission of Material Averment.—Not Cured by Special Finding.—Where a necessary and material averment is wholly omitted from a complaint, such defect cannot be cured by a special finding. pp. 92, 93.

From the Madison Superior Court. *Reversed.*

C. E. Cowgill, Lovett & Ryan and Elliott & Elliott,
for appellants.

W. F. Edwards and Bagot & Bagot, for appellee.

ROBINSON, J.—This case was transferred to this court by the Supreme Court. The city of Alexandria improved a portion of one of its streets. Bonds were issued by the city, and sold for the purpose of raising money to pay the cost of such improvement. This action was brought by appellee, the holder of the bonds, to collect the assessments for the purpose of paying said bonds. The right of way of appellants' does not abut the improvement, but lies back of certain abutting lots, and within one hundred and fifty feet of the improvement. The lots and parcels of land abutting the improvement, and lying between the right of way and the improvement, were assessed, and the owners of these abutting lots and parcels of land, after the assessments were made, waived all defenses they may have had to such assessments and agreed to pay the same.

The trial court ordered a foreclosure of the liens against the abutting property owners, and also gave a personal judgment against those who had signed the waivers, and also gave judgment against appellants for any balance remaining unpaid of the assessment of the intervening abutting owner after such property had been sold and the owner pursued to insolvency. The railroad companies alone have appealed, and first question the sufficiency of the complaint.

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The proceedings were had under the act of March 8, 1889, as amended in 1891, the same being section 4288, *et seq.*, Burns' R. S. 1894. Section 4290 provides that the cost of such improvement shall be estimated according to the whole length of the improved street, per running foot, and shall be apportioned among the lots, parts of lots and unplatted lands bordering on such street in the ratio of the front lines of such lots, parts of lots and unplatted lands to the whole improved line; "and in making the assessment against such owners for the improvement of such lots or parts of lots and unplatted lands the cost shall be assessed upon the ground fronting or immediately abutting on such improvement back to the distance of one hundred and fifty feet from such front line, and the city or incorporated town and the contractor shall have a lien thereon for the value of such improvement; provided, however, that where such land is subdivided or platted the land lying immediately upon and adjacent to the line of the improvement and extending back fifty feet shall be primarily liable to and for the whole cost of the improvement, and, should that prove insufficient to pay such cost, then the second parcel and other parcels in their order to the rear parcel of said one hundred and fifty feet shall be liable in their order." With the complaint is filed an exhibit showing the various lots and tracts of land, and the owners' names against whom the assessments were made. Construing the complaint and the exhibit together, it cannot be said that it shows an assessment was made against appellants. The exhibit shows the property of appellant which is within one hundred and fifty feet of the improvement, but it does not appear that it was assessed.

As the right of way of appellant does not abut on the improved part of the street, they could be made

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liable for no part of the cost of the improvement except by virtue of the provisions of section 4290, *supra*. In the case of *City of Terre Haute v. Mack*, 139 Ind. 99, it was held that in order to make the whole of the first fifty feet primarily liable it is necessary that one person should own the whole of the first fifty feet. That is if two persons each owned twenty-five feet of the first fifty feet the twenty-five feet abutting the improved street should be primarily liable and the second twenty-five feet should be taken only in the event the first was insufficient to satisfy the lien, and that this secondary liability extends back from the street a distance of one hundred and fifty feet. In the opinion in that case, the court, by McCabe, J., said: "But the proviso makes such land liable only in the event that the lots or parcels preceding it toward the front or border have proved insufficient to pay the cost of the improvement. And the amount for which such ground is in any event made liable is not fixed by any assessment or ascertainment either by the engineer or common council, but it is fixed and ascertained by the balance remaining unpaid of the whole amount assessed on the front lot or parcel after the exhaustion of the parcels that precede it to the front. That cannot be known and ascertained until such preceding parcels have been sold."

In the case at bar the abutting owners and those owning lots within the limit of one hundred and fifty feet were joined as defendants, and we think this is permissible under the statute. The statute intends that if the abutting property is insufficient to pay the assessment other property back one hundred and fifty feet shall then be liable. We see no reason for not determining the whole question in one suit. The engineer, it is true, has no power to assess, in the first instance, property secondarily liable; nor does the

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statute provide for a separate assessment upon such property by the engineer after the abutting property has been exhausted. But from the language of the whole statute it must be held that it was the intention of the act to carry the balance of such an assessment to such other property as lies within the limit, and that without any separate assessment being made on such property. The act itself fixes a lien for the unpaid balance upon property secondarily liable. If we are right in this view of the statute, it necessarily follows that, in an action seeking to fix a secondary liability upon such property, it must be made to appear that the municipality took the statutory steps necessary to fix a lien.

The waiver signed by the abutting property owners has no effect in any way in determining the rights and liabilities of appellants. Without holding to what extent such a waiver would be conclusive against the abutting property owners who signed it, it is evident that such waiver can in no way affect the rights of persons whose property is only secondarily liable. Appellants waived no defects, and the statute empowers no one to waive such defects for them. They can rightfully insist that appellee shall show that such steps were taken as result in a valid lien. A valid assessment is the basis of appellants' liability. The statute has provided the manner in which such an assessment may be made. The only power to make it is found in the statute. If the statute is not followed, no assessment with its resulting lien is made. The statute plainly provides the steps to be taken by the council in making such an improvement, and it can be made in no other way. The complaint must show that the council took such jurisdictional steps as legally authorized it to make the improvement. This the complaint does not do.

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It is well settled that in cases like that at bar, the proceedings of a municipality will not be held void, where there has been an attempt to comply with the requirements of the statute though there may have been a failure to strictly comply with its provisions, if the municipality, in addition to its jurisdiction over the subject-matter, had jurisdiction of the persons to be affected. *Otis v. De Boer*, 116 Ind. 531; *Hobbs v. Board, etc.*, 116 Ind. 376; *Jackson v. Smith*, 120 Ind. 520; *Ross v. Stackhouse*, 114 Ind. 200. It is also well settled that a statute giving a municipality power to impose a burden upon the property of an individual must be strictly construed, and that if some act, in its nature jurisdictional, is required to be done as a condition precedent to imposing such burden, the failure of the municipality to do the act required renders the proceedings void. *Barber, etc., Paving Co., v. Edgerton*, 125 Ind. 455, and cases there cited; *Niklaus v. Conkling*, 118 Ind. 289; *Case v. Johnson*, 91 Ind. 477; *Wrought Iron Bridge Co. v. Board, etc.*, 19 Ind. App. 672, and cases cited. In such case it is not necessary to plead at length the proceedings of the council, but it is necessary to plead the acts done by the municipal officers, and such facts as show that they were rightfully done. *Van Sickle v. Belknap*, 129 Ind. 558.

While the holders of the bonds brought the suit, yet the action is not based primarily on the bonds, but upon the proceedings of the common council and the assessment of the property. The rights of appellee in this action are not greater than those of the contractor had he brought the suit; and any defense appellants would have had against the contractor may be interposed in this action. There is a special finding, but this does not cure the defect complained of. Where a necessary and material averment is wholly omitted from a complaint, such defect cannot be cured

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by a special finding. Complaint is made, not of a defective averment, but of the entire omission of a necessary averment. *Western Assur. Co. v. McCarty*, 18 Ind. App. 449. The demurrer to the complaint should have been sustained. Judgment reversed.

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[No. 2,440. Filed April 29, 1898.]

HUSBAND AND WIFE.—Tenants by Entireties.—Gravel Road Assessments.—Appeal by Husband.—Where an assessment for a free gravel road was made against lands held by husband and wife as tenants by entireties, and the husband alone appealed from such assessment to the circuit court and was relieved therefrom by reason of irregularities in the proceedings, such assessment cannot be enforced against the land or any part thereof by reason of the failure of the wife to join in the appeal.

From the Parke Circuit Court. *Affirmed.*

J. M. Johns and *E. Hunt*, for appellant.

T. N. Rice, *J. T. Johnston* and *Albert M. Adams*, for appellees.

WILEY, J.—This was an action by appellant against appellees, to enforce the collection of an assessment for the construction of a free gravel road. Appellees were owners, as tenants by entireties, of certain real estate within the statutory limits of the highway improved. The proceedings for the construction of the free gravel road were under the provisions of the act of 1885, and the amendments thereto. Appellees' real estate was assessed for benefits, and the superintendent of construction issued his certificate against the real estate for the construction of the improvement, to pay for its proportional part, and delivered the same to appellant, as the contractor.

The said certificate was made a part of the complaint, and is as follows: "This is to certify that I,

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the undersigned superintendent, duly appointed by the board of commissioners of Parke county, in the State of Indiana, to superintend the construction of the M. R. Burke *et al.*, free gravel road in said county, have assessed one hundred and thirty-eight dollars against the following described tracts of land in said county, to wit:

Description.	S.	T.	R.	Acres.	Ben. Ass'd.
N. E. 4 N. E. 4	6	15	6	36.50....	\$40.00
N. W. 4 N. E. 4	6	15	6	36.50....	31.00
S. W. 4 N. E. 4	6	15	6	40.00....	35.00
S. E. 4 N. E. 4	6	15	6	40.00....	32.00

\$138.00

Belonging to Sarah E. Collings and H. D. Collings, to pay said land's proportional part for the construction of said work, and all costs and expenses thereof; and that the sum above is payable in six equal installments, in six, twelve, eighteen, twenty-four, thirty, and thirty-six months from date, with six per cent. interest from date; and, if any installment is not paid when due and demand made, the whole certificate shall become due and payable, but the whole amount of this certificate may be paid at any time by the owner or owners of the above lands. November 4, 1895. •\$138.00. Moses R. Burke, Superintendent."

The complaint avers the filing of a petition for the improvement, notice to appellees and all others interested, and that, on presentation to the board of commissioners and after evidence was heard, the board found that due notice had been given, and that the petition had been signed by a majority of the resident land owners within two miles of the proposed improvement; that viewers were appointed and a favorable report made; that said viewers assessed benefits and damages, and shows the assessment as above

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set out; that thereupon due notice of the filing of the report of the viewers was given, and that the same would be heard at a time stated; that said report was confirmed, and the assessments made approved by the board; that a superintendent was appointed, gave bond, and gave notice for letting the contract, etc. The complaint further charges that appellant made a demand upon appellees for payment of the installment and interest due, and their refusal to pay the same, and that by reason thereof the whole of said certificate became due.

A demurrer to the complaint was overruled. The appellees answered separately. The separate answer of Harvey D. Collings admits all the material averments of the complaint, except that there is no admission that the petition for the improvement was signed by a majority of the resident land owners residing within the statutory limit of the proposed improvement. He then avers that he and others duly appealed from the order and judgment of the board of commissioners ordering said improvement, to the Parke Circuit Court, and that upon a final hearing, said court found as to him that all of said proceedings were void; that he was not bound thereby; and rendered judgment accordingly; and that, by reason of the judgment of said circuit court, said certificate was not binding upon him, and did not become a lien on his real estate; and prayed for judgment, etc. The separate answer of Sarah E. Collings was, in substance, like that of her co-appellee, except it does not aver that she appealed from the order of the board of commissioners, but that her codefendant, who was her husband, and others, did appeal, and that by the judgment of the Parke Circuit Court, all proceedings of the board of commissioners were declared to be void and of no effect as to her co-appellee; and that by

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reason thereof said certificate did not become a valid lien upon the real estate therein described, which, at the time, was held by her and her co-appellee as tenants by entireties, but that the same was void, a cloud upon their joint title; and she prayed that the same might be declared void, and that appellant and all persons claiming under him be enjoined from attempting to collect it, etc. The demurrer to each of these answers was overruled, and appellant excepted. The appellant replied separately to each of the paragraphs of answer.

In his reply to the separate answer of appellee Harvey D. Collings, it is admitted that he appeared before the board of commissioners and filed his objections to the proposed improvements, which objections, omitting the caption, etc., were as follows: "Comes now Harvey D. Collings and LaFayette Grose, for themselves and others, and show the court that they are resident land owners within two miles of the improvement prayed for, and moves the court to dismiss the petition herein, because the same is not signed by a majority of all the resident land owners, within two miles of the improvement prayed for in said petition." The reply further admits that, upon appeal, appellee renewed his objections, and that by the judgment of the Parke Circuit Court the proceedings of the commissioners, as to him, were set aside, etc. It is then averred that at the time appellee Harvey D. Collings owned certain lands in his own name, affected by said improvement and liable to be assessed therefor, which said lands are described; that he and his co-appellee were owners as tenants by entireties of the land described in the certificate sued upon, but that at no time did appellee Harvey D. Collings, for himself and wife, as tenants by entireties, make any objection to the improvement or to the assessment of the land de-

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scribed in the complaint. It is then averred that the lands described in the complaint were not relieved or released from the lien of the assessment as made by said proceedings in the Parke Circuit Court. A copy of the order book entries and judgment of the circuit court is filed with the reply as an exhibit.

Appellant's reply to the separate answer of appellee Sarah E. Collings avers, substantially, the same facts as those in his reply to the answer of Harvey D. Collings, and differs from it only in the averment that Harvey D. Collings did not at any time, for himself and his wife, as tenants by entireties, or in company or jointly with her, file any objection to the proposed improvement, or the assessment of the lands described in the complaint, and that the judgment entered by the circuit court did not describe or refer to the lands owned by appellees as tenants by entireties. The court sustained a demurrer to these separate replies, to which the appellant excepted, and, refusing to plead further, judgment was rendered against him for costs. The adverse rulings on these several demurrers are assigned as error.

It appears from the facts stated that appellees were tenants by entireties, and as such, owned the real estate against which appellant seeks to enforce his alleged claim. Appellee Sarah E. Collings did not appeal from the order and judgment of the board of commissioners, and the sole question for determination is, are the appellees, or either of them, relieved from liability by virtue of the judgment of the circuit court on the appeal of the appellee Harvey D. Collings, under the facts stated in the answers and reply?

It seems to us that there can be no doubt but what by his appeal, and the judgment of the circuit court, appellee Harvey D. Collings was released from the

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force and effect of the judgment of the board of commissioners, and the latter judgment was vacated. See *Anderson v. Claman*, 123 Ind. 471; *Fleener v. Claman*, 126 Ind. 166; *Cason v. Harrison*, 135 Ind. 330. It seems equally clear also, that the judgment of the board of commissioners against appellee Sarah E. Collings, from which she did not appeal, is effective and binding against her individually, and would be a lien upon her individual property, if embraced within the judgment. But here appellant seeks to enforce a lien against real estate held by appellees as tenants by entireties, and to determine his right to the remedy pursued, we must look first to the nature and principles of such tenancy. The common law fiction of the unity of the husband and wife, applies with much force here. At common law they were one person, and when realty vested in them they took as one person. Where real estate vested in them both equally with a third party, they together took but one share or moiety, and the third party took the other share or moiety. The common law rule has not been changed by statute in this State, in so far as it relates to tenancies by entireties. As stated in 9 Am. and Eng. Ency. of Law, page 850, the rule is: "That moiety, or in case the whole property vests in them alone, the whole, they take as one person, they take but one estate as a corporation would take. In case of realty, they are seized, not *per my et per tout*, as joint tenants are, but simply *per tout*; both are seized of the whole, and each being thus seized of the entirety. * * * and the estate is an estate by entireties." In *Den v. Hardenbergh*, 10 N. J. L. 42, 45, the court said: "The very name joint tenants, implies a plurality of persons. It cannot then aptly describe husband and wife, nor correctly apply to the estate vested in them, for in contemplation of law they are one person. * * * Of

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husband and wife, both have not an undivided moiety, but the entirety. * * * Each is not seized of an undivided moiety, but both are, and each is seized of the whole." See, also, *Taul v. Campbell*, 7 Yerg. (Tenn.) 319, 27 Am. Dec. 508.

Neither tenant by the entirety can convey his or her interest in the estate so as to affect their joint use of the property during their joint lives, or to defeat the rights of the survivor upon the death of either of the co-tenants. Neither can there be partition between tenants by the entireties. Upon the latter proposition the case of *Chandler v. Cheney*, 37 Ind. 391, is very instructive. One of the co-tenants by the entireties cannot convey or encumber the estate so held without the consent of the other, and neither is the estate liable for the debts of one of the tenants. If one of such co-tenants dies, the estate continues absolute in the survivor. The estate by entireties is inseverable, can not be partitioned; and neither husband nor wife can alone affect the inheritance, the survivor's right to the whole. See, in addition to the authorities cited, *Hemingway v. Scales*, 42 Miss. 17; *Farmers and Mechanics Nat'l Bank v. Gregory*, 49 Barb. (N. Y.) 155; *Bennett v. Child*, 19 Wis. 383; *Corinth v. Emery*, 63 Vt. 505.

Mr. Preston, who was the greatest conveyancer and authority upon titles in England, said: "The husband and wife have not either a joint estate, a sole or several estate, nor even an estate in common. From the unity of their persons by marriage, they have the estate entirely as one individual, and on the death of one of them, the entire tenement will, for all the estate of which they are seized in this manner, belong to the survivor, without the power of alienation or forfeiture of either alone, to prejudice the right of the other." Preston on Estates, 131. This rule of the common law has been engrafted into the statute laws of this

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State, by express enactment of the legislature, and has been recognized and acted upon since 1807. And although the rights of married women have been enlarged by the statute, and especially by the married womans' act of 1881, yet the unbroken line of authorities in this State are to the effect that the common law rule as to tenancies by entireties has not been abrogated or changed. See *Carver v. Smith*, 90 Ind. 222, and authorities there cited. And so in this State, where husband and wife hold real estate as tenants by entireties, the estate is not subject to execution and sale to satisfy a debt against either. *Bevins v. Cline*, 21 Ind. 37; *Davis v. Clark*, 26 Ind. 424, 89 Am. Dec. 471; *Patton v. Rankin*, 68 Ind. 245, 34 Am. Rep. 254; *Lash v. Lash*, 58 Ind. 526. Many other authorities might be cited.

It appears from the record in this case that the circuit court, by its judgment, released the appellee Harvey D. Collings from the assessments, which was equivalent to releasing his lands, which were subject to such assessments. This is apparent for the reason that the assessment of real estate for the construction of a free gravel road, creates an obligation *in rem* and not *in personam*. In the order and judgment of the court, no real estate whatever is described, but it does appear that an assessment against the appellee Sarah E. Collings was confirmed in the sum of \$20.00. It is manifest that this was no part of the assessment which appellant is seeking here to enforce. By his appeal to the circuit court, appellant Harvey D. Collings, sought the only remedy at his command and known to the law, for relief from an assessment for the construction of a free gravel road, which was unauthorized and void, because the petition for the improvement was not signed by the requisite number of property owners whose lands were to be affected. So

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far as such proceedings affected the lands in controversy, he owned it, under the authorities above cited, and the fundamental principles underlying tenancies by the entirety. True he could not encumber or dispose of it without his wife joining him, yet because this is true, it does not necessarily follow that he could not protect his rights in it, as well as the rights of his wife. He was in possession of the property, and the right of possession, if nothing more, gave him the right to protect it. *Sheridan Gas, Oil & Coal Co. v. Pearson*, 19 Ind. App. 252, is strongly in point. There appellant and his wife were owners, as tenants by entirety, of property occupied by appellee as a store room. There was an explosion of natural gas, whereby the building was damaged, and it was held that he could recover in his own right for the injury sustained. Comstock, J., delivering the opinion of the court, collected and cited a number of cases strongly in point. From the principles upon which tenancies by the entirety are based, and the authorities to which we have referred, we are of the opinion that the court did not err in overruling appellant's demurrer to the separate answers of appellees, and in sustaining appellees' demurrer to appellant's reply thereto. Judgment affirmed.

IRWIN v. REEVES PULLEY COMPANY.

[No. 2,286. Filed Nov. 19, 1897. Rehearing denied April 29, 1898.]

BANKS AND BANKING.—*Collections.*—*Default of Correspondent.*—A bank in accepting for collection a draft payable at a distant bank is only bound to the exercise of reasonable skill and ordinary diligence in selecting its correspondents and making the collection, and is not liable for the default of a correspondent, where due care was exercised in the selection of such correspondent.

From the Bartholomew Circuit Court. *Reversed.*

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Simeon Stansifer and Charles S. Baker, for appellant.

George W. Cooper and Cassius B. Cooper, for appellee.

HENLEY, J.—The question for determination in this cause is this: Did the appellant in accepting for collection, in the ordinary course of business, the draft delivered to it by appellee, guarantee the solvency of the intermediate banks through which the said draft passed before it was finally presented to the drawee, and paid?

It appears from the record that on the 10th day of July, 1893, appellee delivered to appellant, who was engaged in the general banking business at Columbus, Indiana, a draft for collection. This draft was drawn upon the Baker Iron Works of Los Angeles, California, was for the sum of \$414.25, and was made payable to the order of appellee. At the time of the delivery of the draft to appellant, appellee indorsed it as follows: "Pay to W. G. Irwin, or order, for collection. Reeves Pulley Co." Appellant, not having a correspondent in Los Angeles, transmitted the draft to its regular correspondent at Indianapolis, Indiana, the Indianapolis National Bank, for collection, indorsing the said draft as follows: "Pay E. E. Rexford, Cas., or order, for collection, and credit Irwin's Bank of Columbus, Indiana. W. G. Irwin, Cashier." Upon receipt of the draft from appellant, the Indianapolis National Bank transmitted it for collection to its correspondent at Los Angeles, California, by the following indorsement: "Pay State Loan & Trust Company or order, for collection, for the Indianapolis National Bank, Indianapolis, Indiana. E. E. Rexford, Cashier." The State Loan & Trust Company presented the draft to the drawee and received

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the full amount called for by it. Thus, it will be observed that in the usual course of business, the draft was presented to the drawee and paid. At the time the draft was so paid to the State Loan & Trust Company, the Indianapolis National Bank was indebted to said Trust Company in an amount greater than the amount of the draft, and the Trust Company credited the account of the Indianapolis National Bank with the amount so collected, and notified it of that fact. In the meantime, the Indianapolis National Bank suspended, went into the hands of a receiver, and no money or proceeds from said draft has ever come into the hands of appellant. It is upon these facts that appellee's complaint is predicated, and upon which he seeks to hold appellant liable for the amount of the draft so deposited with appellant for collection. It is not shown or attempted to be shown in either paragraph of appellee's complaint, that the appellant was negligent or did not exercise ordinary care in the selection of its correspondents, or that appellant knew, or in the exercise of ordinary care ought to have known of the insolvency of the Indianapolis National Bank, to which appellant, in the ordinary course of business, transmitted the draft in question for collection. The complaint, then, presents the naked legal proposition, upon the facts averred: Is the appellant the insurer of the solvency of the Indianapolis National Bank? The lower court overruled a demurrer to both paragraphs of the complaint. Appellant excepted, and has assigned the ruling as error to this court.

Appellant answered in three paragraphs. The first paragraph of answer is as follows: "Answer. First paragraph: For answer to plaintiff's complaint in the above entitled cause, defendant says: That for a long time prior to and on the 10th day of July, 1893, he

has engaged in and doing a general banking business in the city of Columbus, Indiana, under the name and style of 'Irwin's Bank, Columbus, Indiana,' and as a part of said bank's business, as was its custom and course of dealing with all its regular customers, said bank undertook, for the accommodation of its said customers, to transmit, for collection, to banks at other points or places, drafts or other evidences of indebtedness on parties residing at such points or places, without other cost or charge than the expense which defendant would have to pay to the bank making such collections when sent to a point where defendant or its correspondent bank had no correspondent bank; and, when defendant had no correspondent bank at the point or place where collection was to be made, defendant would, unless otherwise directed, in order to save expense to its said customers, send the same to its most convenient correspondent bank, which in turn, had a correspondent bank at the point or place of collection. That prior to and on said 10th day of July, 1893, plaintiff was a regular customer of defendant's said bank, and fully acquainted with defendant's custom and manner of doing business as aforesaid, and had long acquiesced therein; and plaintiff well knew when the draft mentioned in plaintiff's complaint was delivered to said defendant that the same would have to be transmitted to another bank or banks for collection. That on said 10th day of July, 1893, without any other direction, agreement or understanding than that implied from plaintiff's knowledge of and acquiescence in defendant's custom and course of dealing, as aforesaid, and from the knowledge on plaintiff's part that said draft would have to be transmitted to another bank or banks for collection, plaintiff did deliver said draft to defendant's bank to be transmitted for collection in the manner

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aforesaid, and to facilitate such collection, indorsed thereon as follows: 'Pay to W. G. Irwin, Cas., or order, for collection. Reeves Pulley Co.'"

"That defendant had no correspondent bank at Los Angeles, California, the place where the drawee resided and where collection was to be made; and defendant's most convenient correspondent bank, which in turn had a correspondent bank at Los Angeles, California, was the Indianapolis National Bank, at Indianapolis, Indiana; that accordingly and in order to save expense to plaintiff, as aforesaid, defendant transmitted said draft to said Indianapolis National Bank, to be by it transmitted to its correspondent bank at Los Angeles, California, and to facilitate collection thereof, defendant indorsed said draft as follows: 'Pay E. E. Rexford, Cas., or order, for collection, and credit Irwin's Bank, Columbus, Indiana. W. G. Irwin, cashier.' That said Indianapolis National Bank, in turn, at once transmitted said draft to its correspondent bank, the State Loan and Trust Company, a bank doing a general banking business at Los Angeles, California, and to facilitate collection thereof indorsed said draft as follows: 'Pay State Loan and Trust Company, or order, for collection for the Indianapolis National Bank, Indianapolis, Indiana. E. E. Rexford, cashier.' That said draft was paid to said State Loan and Trust Company on the 19th day of July, 1893, and credited on said day by said bank to said Indianapolis National Bank; that, at the time of said entry and credit upon the books of said State Loan and Trust Company, the said Indianapolis National Bank was its debtor to an amount in excess of the sum so credited; that said Indianapolis National Bank failed and went into the hands of a receiver as insolvent on the 24th day of July, 1893, and notice of said collection and credit, as afore-

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said was received by said Indianapolis National Bank on the 26th day of July, 1893. That at the time said draft was transmitted to said Indianapolis National Bank, said bank was generally supposed and reported in banking and commercial circles to be solvent and trustworthy, and defendant had no knowledge or information to the contrary, or reason to believe or suspect otherwise. That said Indianapolis National Bank still remains in the hands of a receiver, with its assets and liabilities yet unascertained; and that said State Loan and Trust Company still retains said sum so collected and credited, and claims the same as its own. Wherefore plaintiff ought not to recover."

Appellant's second paragraph of answer differs from the first in this: That in addition to the facts averred in the first paragraph, it avers that appellant "undertook, for the accommodation of its said customers, and not otherwise, to collect by, transmitting for collection, and not otherwise," and that appellant delivered said draft to appellant "for collection in the manner aforesaid and not otherwise." The third paragraph of appellant's answer is substantially the same as the first, except that it is therein alleged that appellant's custom and course of dealing in undertaking to transmit for collection said draft in the manner in which the same was done, and without charge, to its regular customers, was and is the custom of banks generally, but does not charge appellee with knowledge of the custom.

The lower court sustained a demurrer to each paragraph of appellant's answer. Appellant excepted to the ruling of the court, and has assigned such ruling to this court as error. Appellant refused further to answer the complaint, and upon such refusal the court assessed appellee's damages at \$459.10, and rendered judgment in appellee's favor for said amount.

The importance of the question herein involved is, we think, a sufficient excuse for the extended statement of the pleadings. It will be well to consider at the very threshold of the cause, the contention of appellee's counsel, that the question discussed herein is not an open question for this court, the same having been settled in appellee's favor by the Supreme Court of this State. With due regard for the opinion of appellee's learned counsel, the writer is of the opinion that the question presented herein has never been before the Supreme Court of this State for decision. The cases which are cited by appellee's counsel, to sustain their position, are, *Tyson v. State Bank*, 6 Blackf. 225; *American Express Co. v. Haire*, 21 Ind. 4; *First Nat'l Bank v. First Nat'l Bank*, 76 Ind. 561; *Chapman v. McCrea*, 63 Ind. 360; *Pollard v. Rowland*, 2 Blackf. 22; *Abbott v. Smith*, 4 Ind. 452.

In *Tyson v. State Bank*, *supra*, the negligence of the bank in not presenting the bill to the drawee for acceptance or payment was the breach for which the bank was held liable. The court deciding the case, speaking by Sullivan, J., said: "The State Bank, through its branch at Lafayette, agreed with the plaintiff, for a valuable consideration, to collect the bill described in the declaration. The plaintiff confided its interests to the prudence and fidelity of the bank. The defendant made no effort, as we learn from the declaration, to collect the bill. It was not presented to the drawee for acceptance or payment, consequently there was neither protest nor notice of its dishonor. For such negligence, the defendant is responsible to the plaintiff for the damages he has sustained." The cases cited by the court in support of the opinion quoted from are all cited as to this point only.

In *American Express Co. v. Haire*, *supra*, Perkins,

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J., speaking for the court, said: "The main question in the cause is: Did the express company become liable to the holders for the amount of the bill on account of the failure to demand its payment on the proper day?" The answer to this question is briefly stated by the syllabus to the case, and covers the whole opinion, as follows: "If an express company receives for collection, for a compensation, a bill of exchange drawn in one state and payable in another, and delivers the same to a notary for demand and protest on the day before such demand and protest should be made, and such notary makes demand and protest one day before the maturity of the bill, whereby the drawers and endorsers are discharged, the acceptor being insolvent, the express company will be liable to the holder for the amount of the bill and interest." In the last mentioned case, the bill of exchange never passed out of the hands of the express company to a correspondent or agent. The notary was the servant of the express company employed by it to fix the liability of the drawer and indorsers. This he failed to do, and on account of his negligence, the express company was held liable to the holder of the bill.

In the case of *First Nat'l Bank v. First Nat'l Bank, supra*, the question involved in this appeal is not touched upon, but it is held in that case that the owner of a draft deposited for collection could recover the proceeds in the hands of the intermediate bank or subagent, and that "no objection can be successfully made on the ground of want of privity." The court, in sustaining its position, cites Morse on Banks and Banking, an authority confessedly against the position taken by appellee in this cause. The case of *Chapman v. McCrea, supra*, is almost identical with the case of *Tyson v. State Bank, supra*. In *Chapman v.*

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McCrea the facts were as follows: A promissory note, negotiable under the law merchant as an inland bill of exchange, was deposited before maturity in the bank, where the same was payable, by a *bona fide* indorsee for collection; but, on maturity of the note, which remained unpaid, the bank failed to protest the note and to notify the indorsee of its nonpayment. Shortly afterward the maker was adjudged a bankrupt, and the indorsee sued the bank for damages. It was held that the complaint averring such a state of facts was good upon demurrer. The bank was held for negligence,—a failure to perform a duty. The cases of *Pollard v. Rowland*, *supra*, and *Abbott v. Smith*, *supra*, were both cases where collections were placed in the hands of attorneys, who, without the knowledge or consent of the creditors, placed the collections in the hands of other attorneys. The attorneys with whom the collections were first placed were held liable for the default of the attorneys to whom they had intrusted the business. It will certainly not be contended that if an attorney who receives a note for collection and places the same in the hands of another attorney for collection, with the knowledge and consent of the owner, that the first attorney will be held for the default of the second.

The question presented by this appeal has not been decided by the Supreme Court of this State, but it has held, applying the doctrine to the case at bar, that there is no want of privity between appellee and the State Loan and Trust Company. *First Nat'l Bank v. First Nat'l Bank*, *supra*.

The authorities which hold that the transmitting bank (appellant) is not liable for the default of its correspondents, do so upon the ground that a collecting bank is an agent for transmission to a subagent to collect, and when this is properly done, and the sub-

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agent has been selected with reasonable care, its duty is performed and its responsibility is at an end. Appellee must have known when he deposited the draft, drawn upon a resident of California, with appellant for collection, that appellant's officers could not themselves present the draft to the drawee for acceptance and payment, and appellant became the agent of appellee with full authority to employ the usual and necessary means for the proper execution of the agency.

"It is a general principle that an agent's authority is construed to embrace all the means usual and necessary for its proper execution. Accordingly, when the agent can show that the instructions of his principal could not have been properly executed without the employment of deputies, he will be warranted in delegating so much of his authority as the character of his agency demands." 1 Am. and Eng. Ency. of Law (2nd ed.) 980; Evans on Agency (Ewell's ed.) 44; Mechem on Agency, section 194; Story on Agency, section 201-214; *Dun v. City Nat'l Bank*, 58 Fed. 174; Wright on Agency, 55-56.

There is no conflict of the authorities as to the law of agency as above set forth. What, then, is its application to the case at bar? Under the indorsement and delivery of the draft by appellee to appellant, did appellant become the agent of appellee for the collection of the draft? Was it necessary for the proper execution of this agency, if one was so created, that the agent should employ subagents? Was appellant charged with knowledge of the necessity of the employment of subagents when he created the agency? Mechem, in his work on Agency, section 514, says: "The same conflict of authority exists as to the liability of a bank which receives, in the ordinary manner, a note or bill payable at a distant place, and sends it to its correspondent there for collection. It is well

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established in New York that in such a case the correspondent bank is the agent of the bank from which it receives the paper, and not of the depositor or owner of the paper. The transmitting bank is, therefore, liable for the neglect or default of the corresponding bank in making the collection and transmitting the proceeds. This rule prevails, also, in Michigan, Ohio, New Jersey, Montana, Indiana, the supreme court of the United States, and in England. It is based upon the principle that the home bank having undertaken the collection of the paper stands in the attitude of an independent contractor who is left at liberty to select and does select his own agents and correspondents, and is, therefore, liable for their default. But in a majority of the states, however, a different rule prevails, and it is held that the liability of the home bank, in the absence of instructions or an agreement to the contrary, extends merely to the selection of a suitable and competent agent at the place of payment and the transmission of the paper to such agent with proper instructions. * * * This rule is based upon the theory that from the nature of the case there is implied authority, upon the ground of necessity, for the appointment of a subagent, and that in this, as in other cases, the agent fulfils his duty when he uses due care in the selection of the subagent."

As we have shown, the author of the above quotation is in error so far as the statement concerning the position of the courts of Indiana is concerned, as is also recognized and stated in 3 Am. and Eng. Ency. of Law (2nd. ed), page 811, where it is said: "It is stated in several leading cases upon this subject * * * that the courts of Indiana have adopted the view that the forwarding bank is liable for the default if its correspondent. And in the cases of *Tyson v. State Bank*, 6 Blackf. 225, 38 Am. Dec. 139, and *Amer-*

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ican Express Co. v. Haire, 21 Ind. 4, 83 Am. Dec. 334, are relied upon to support the assertion. In neither of these cases, however, was the point under discussion raised or determined."

Upon the question of the agency of the forwarding bank, the court of appeals of New York, speaking by Mr. Justice Peckham, said: "The indorsement upon each piece of paper was for collection simply, and by virtue of that indorsement no title passed to the firm, but, on the contrary, it became simply the agent of the plaintiff to present the paper, demand payment thereof and remit it." *National Butchers & Drovers' Bank v. Hubbell*, 117 N. Y. 384.

In the case of *Dun v. City Nat'l Bank*, 58 Fed. 174, the court said: "It appears from the agreement that the services demanded by the principal—the obtaining of information—cannot be rendered by the agent, but must be mainly rendered by subagents. In such cases the agent will not be liable for the negligence or misconduct of his subagent, provided there was no negligence or misconduct in his selection. * * * When the business intrusted to an agent is to be performed at a distance, or requires or justifies the delegation of an agent's authority to a subagent who is not his own servant, the original agent is not liable for the errors or misconduct of the subagent if he has used due care in his selection." To the same effect see *Barnard v. Coffin*, 141 Mass. 37. Applying these principles to the case at bar leads to the proper solution of the question presented herein.

"When a draft, payable at a distant place, is left with a bank for collection, it must be presumed that it is intended to be transmitted to a subagent at the place where it is payable, and not that the bank is to employ its own officers to proceed there for the purpose of

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obtaining payment." 1 Am. and Eng. Ency. of Law (2nd ed.), 980.

In 1 Morse on Banks and Banking, page 487, it is said: "The parties to a contract are presumed to contract in reference to well established usage, in this particular as in others. The very question is whether the contract to collect can be fairly construed to be, by the understanding of the parties, an agreement that the first bank shall personally or by its servants do the collecting in the distant city, or whether, considering that the usage of trade is universal and well established to send the paper to some correspondent bank entirely independent of the first, and not its servant any more than a lawyer is the servant of his client, and considering that no compensation is taken by the first bank at all commensurate with such a risk as that of loss by negligence of subagents, is it not fairer to construe the contract intended to be simply one of transmission; and if so, then the question arises: Is there good reason on any other ground for extending the liability of the first bank beyond the consequences of its own lack of due care and that of its servants?"

The case of *Guelich v. National State Bank*, 56 Iowa 434, 9 N. W. 328, is strongly in point. In the last mentioned case the court said: "The course of business of defendant, and all other banks, is, in such cases, to make collections through correspondents. They do not undertake themselves to collect the bills, but to indorse them to other banks at the place where payment is to be made. The holder of the paper, having full notice of the course of business, must be held to assent thereto. He, therefore, authorizes the bank with whom he deals to do the work of collecting through another bank. * * * The bank receiving

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the paper becomes an agent of the depositor with authority to employ another bank to collect it. The second bank becomes the subagent of the customer of the first, for the reason that the customer authorizes the employment of such an agent to make the collection. The paper remains the property of the customer, and is collected for him; the party employed, with his assent, to make the collection, must therefore be regarded as his agent."

The case of *Allen v. Merchants' Bank*, 22 Wendell 215, 34 Am. Dec. 289, firmly established the doctrine, contended for by appellee, in the State of New York. The decision was by an almost evenly divided court, fourteen members being upon one side and ten upon the other. Mr. Freeman has this to say of the decision, in a note following the principal case: "The preponderance of authority is against the doctrine of the principal case, and in favor of the rule that the liability of a bank taking a note or bill for collection, which is payable at a distance, extends merely to the selection of a suitable and competent agent at the place of payment, and to the transmission of the paper to such agent with proper instructions, and that the correspondent bank is the agent, not of the transmitting bank, but of the holder, so that the transmitting bank is not liable for the defaults of the correspondent, where due care has been used in making the selection of such correspondent.

The rule adopted in the case of *Allen v. Merchants' Bank*, *supra*, was adopted by the supreme court of the United States in the case of *Hoover v. Wise*, 91 U. S. 308, with Justices Miller, Clifford and Bradley dissenting. The same rule was adopted by divided courts in the states of New Jersey and Ohio, and while Michigan has adopted the same rule, an eminent member of the bar of that State, in his valuable work on

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Agency takes strong ground against it, and concludes that it is against the great weight of authority in this country. Mechem on Agency, section 514.

We do not believe it necessary to further quote from the decisions sustaining appellant's contention in this cause. The following cases will be found in point and will serve to show the wide range of the authority for the position taken in this opinion.

We thus conclude that the acceptance of the draft to collect only binds the bank to the exercise of reasonable skill and ordinary diligence in making the collection and in the selection of its correspondents. *Merchants, etc., Bank v. Stafford National Bank*, 44 Conn. 565; *Fabens v. Mercantile Bank*, 23 Pick. (Mass.) 330; *Third Nat'l Bank v. Vicksburgh Bank*, 61 Misc. 112; *Guelich v. National St. Bank*, 56 Iowa 434; *Bank of Louisville v. First Nat'l Bank*, 8 Baxt. 101; *Fifth Nat'l Bank v. Ashworth*, 123 Pa. St. 212, 16 Atl. 596; *Hum v. Union Bank*, 4 Rob. (La.) 109; *Wilson & Co. v. Smith*, 3 How. (U. S.) 763; *Lawrence v. Stonington Bank*, 6 Conn. 521; *Warren Bank v. Suffolk Bank*, 10 Cush. (Mass.) 582; *Planters', etc., Bank v. First Nat'l Bank*, 75 N. C. 534; *Daly v. Butchers', etc., Bank*, 56 Mo. 94; *Aetna Ins. Co. v. Alton City Bank*, 25 Ill. 221; *Drovers' Nat'l Bank v. Anglo-American Packing, etc., Co.*, 117 Ill. 100, 7 N. E. 601; *Stacy v. Dane County Bank*, 12 Wis. 629; *Citizens Bank v. Howell*, 8 Md. 530; *Merchants' Nat'l Bank v. Goodman*, 109 Pa. St. 422, 2 Atl. 687; *Hyde v. Planters' Bank*, 8 Rob. (La.) 416; *German Nat'l Bank v. Burns*, 12 Colo. 539, 21 Pac. 714; *Bank of Lindsborg v. Ober*, 31 Kan. 599, 3 Pac. 324; *Waterloo Milling Co. v. Kuenster*, 158 Ill. 259, 41 N. E. 906; *Farmers' Bank v. Newland*, 97 Ky. 464, 31 S. W. 38; *First Nat'l Bank v. Sprague*, 34 Neb. 318, 51 N. W. 846; *Bank of Washington v. Trip-*

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lett, 1 Pet. 25, decided by Marshall, C. J.; 1 Morse on Banks and Banking (3rd ed.), c. 17; Bolles on Bank Collections, c. 10.

We must conclude, therefore, that when appellee placed the draft in appellant's hands for collection, appellant became the agent of appellee for the collection and transmission of the draft, with implied authority to do whatever was reasonably necessary to accomplish the work; that appellant having exercised reasonable care in the selection of subagents necessarily employed to do the work, and seasonably transmitted the draft through such subagents to the place of payment, his whole duty has been performed.

In the opinion of this court neither paragraph of the complaint states a cause of action against appellant; that the lower court erred in overruling the demurrer to each paragraph of the complaint, that the decision of the lower court is not only against the great weight of authority in this country upon the direct point at issue, but that it is contrary to the commonly accepted mercantile usages and customs, and violates the settled laws as applied to agents. Judgment reversed, with instructions to the lower court to sustain the demurrer to both paragraphs of appellee's complaint.

ON PETITION FOR REHEARING.

HENLEY, J.—Appellee has filed a petition for a rehearing in this cause, in which it is urged that certain material allegations of the second paragraph of complaint have been ignored by the court. It is claimed by counsel for appellee that the averments of the second paragraph of complaint, viz: that appellant and appellee entered into an agreement by the terms of which appellee, who was a large depositor with appellant, should charge appellant nothing in the way of

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interest on the deposits, and that appellant, by reason thereof should charge appellee nothing in excess of the actual expense thereof, for services rendered in the collection of drafts drawn by appellee, make an entirely different case from the case presented by the first paragraph of complaint, and that the cases cited as applicable to the first paragraph of complaint are not in point, when applied to the facts averred in the second paragraph. The well settled principle of agency, that when the business intrusted to an agent is to be performed at a distance, or requires the delegation of an agent's authority to a subagent, the original agent is not liable for the error or misconduct of the subagent, if he has used due care in his selection, is the governing rule in all the cases cited in support of the doctrine announced in the opinion in this cause. The fact that the bank first employed was to receive a consideration for the collection of a foreign draft which the owner knew could be collected only by the transmission to a subagent at the place where it was payable, could not change the rule of agency.

Agents are not presumed to do their work without consideration. If, for a consideration, the appellant had guaranteed the solvency of the subagent employed by him in making appellee's collections, or guaranteed appellee from loss from any reason growing out of the misconduct of subagents employed by appellant in making collections for appellee, an entirely different case would be presented. We see no reason to change the decision of the court. Petition for a rehearing overruled.

DISSENTING OPINION.

ROBINSON, J.—Believing that the opinion adopted by the majority of the court is contrary to the doctrine laid down by the Supreme Court, that it is opposed to

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the great weight of authority in other jurisdictions, and that on principle, the judgment of the lower court should be affirmed, I am constrained to dissent from the conclusion reached.

The question presented by this appeal is, whether a bank in this State, receiving a draft for collection on a drawee at some distant point and undertaking its collection through a number of correspondent banks, is liable to the payee of the draft for the default of any of such correspondents. Are the correspondent banks the agents of the home bank or the agents of the owner of the paper?

The first paragraph of the appellant's answer avers that on the 10th day of July, 1893, he was engaged in the banking business under the name of "Irwin's Bank, Columbus, Indiana," and as was its custom and course of dealing with its regular customers, undertook, for the accommodation of such customers, to transmit for collection to banks at other places, drafts and other evidences of indebtedness without other cost than the expense paid the bank making such collection when sent to a point where appellant or its correspondent bank had no correspondent bank, and when appellant had no correspondent bank at the point or place where collection was to be made, appellant would, unless otherwise directed, send the same to its most convenient correspondent bank, which in turn, had a correspondent bank at the point or place of collection; that appellee knew appellant's method of making collections, and on said day, without any other agreement than that implied by such knowledge, appellee delivered to appellant the draft sued on, and indorsed thereon: "Pay to W. G. Irwin, Cas., or order, for collection. Reeves Pulley Co.;" that appellant had no correspondent bank in California where the collection was to be made, and that appel-

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lant's most convenient correspondent bank, which in turn had a correspondent bank in California, was the Indianapolis National Bank at Indianapolis, Indiana; that appellant transmitted said draft to the Indianapolis National Bank to be by it sent to its correspondent bank in California and indorsed the draft as follows: "Pay E. E. Rexford, Cas., or order, for collection, and credit Irwin's Bank, of Columbus, Ind. W. G. Irwin, Cashier." That said Indianapolis National Bank, in turn, sent the draft to its correspondent bank, The State Loan and Trust Company of Los Angeles, California, and indorsed the draft, "Pay State Loan and Trust Company, or order, for collection for the Indianapolis National Bank, Indianapolis, Indiana. E. E. Rexford, Cashier." That said draft was paid to said State Loan and Trust Company on July 19, 1893, and credited on said day by said bank to said Indianapolis National Bank, and that at said time the Indianapolis National Bank was debtor to the State Loan and Trust Company in a sum in excess of the amount of the draft, that said Indianapolis National Bank failed and went into the hands of a receiver as insolvent on the 24th day of July, 1893, and two days later notice of said collection and credit was received by said Indianapolis National Bank; that at the time the draft was sent to the Indianapolis National Bank it was supposed and reputed to be solvent, and appellant had no notice or information to the contrary; that said Indianapolis bank still remains in the hands of a receiver with its assets and liabilities unascertained, and that said State Loan and Trust Company still retains said sum so collected and credited, and claims the same as its own.

The second paragraph differs from the first only in averring that said bank "undertook, for the accommodation of its said customers, and not otherwise, to col-

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lect by transmitting for collection, and not otherwise," and that said draft was delivered to defendant "for collection in the manner aforesaid, and not otherwise."

The third paragraph is the same in substance as the first, except it avers defendant's custom and course of dealing in undertaking "to transmit for collection" in the manner and without charge to its regular customers as alleged to be "the custom of banks generally," but omits the direct averment as to plaintiff's acquaintance with the custom. Demurrers to these paragraphs of answer were sustained and these rulings are the only errors assigned.

It is argued by appellant's counsel that the doctrine of the first bank's liability is opposed by the analogies of the law; that the compensation is so manifestly inadequate as to refute an implied assumption of so great a liability; and that by the usages of trade, the usual dealings between parties, and the exigencies of the case, the employment of a subagent to make the collection was authorized by the appellee. In *Pollar v. Rowland*, 2 Blackf. 22, Rowland, an attorney, without the knowledge of his client, who had given him for collection a note on a party residing in a county in which Rowland did not practice law, and forty miles distant from Rowland's, employed another attorney to make the collection, the latter being in default, the first attorney was held liable. See, also, *Abbott v. Smith*, 4 Ind. 452.

It is evident, from the nature of each of the successive indorsements, that the title to the draft, or to its proceeds, never passed out of the Reeves Pulley Company. The California bank by virtue of the indorsements never acquired any right to the proceeds of the draft. In *Siceeny v. Easton*, 1 Wal. 166, in speaking of an indorsement similar to these in the

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case at bar, the court said: "The words 'for collection' evidently had a meaning. That meaning was intended to limit the effect which would have been given to the endorsement without them, and warned the party that, contrary to the purpose of a general or blank endorsement, this was not intended to transfer the ownership of the note or its proceeds." *City Bank v. Weiss*, 61 Tex. 331, 60 Am. Rep. 29; *Blaine v. Bourne*, 11 R. I. 119, 23 Am. Rep. 429; *Bradstreet v. Everson*, 72 Pa. St. 124, 13 Am. Rep. 665; *Evansville Bank v. German-American Bank*, 155 U. S. 556. It is true, it has been held that a person "acting without reward, except the privilege of using the money, was not bound to use more than ordinary care and was liable for gross negligence only." *Bronnenburg v. Charman*, 80 Ind. 475.

In the case at bar the draft was not delivered to appellant to be held in trust for some specific purpose and then returned to appellee. Nor was it delivered to appellant to be by him simply transmitted to the one who was to pay it in California, but the purpose of the delivery and the undertaking by appellant was not only to send the draft to the payer but to return to appellee its proceeds. When appellee delivered and appellant accepted the draft with the indorsement, "Pay to W. G. Irwin, Cashier, or order, for collection. Reeves Pulley Co.," it cannot be said that appellee delivered the draft and appellant accepted it for transmission only. This would be giving to the transaction between the parties an entirely different meaning from that conveyed by the language which they themselves used. It must be concluded that if appellant had intended to undertake only the transmission of the draft it would have been so expressed in the indorsement. From the nature of the transaction between the parties, it is not to be presumed that,

appellee expected to receive the proceeds of the draft from the party owing it, but that the proceeds would be returned through appellant's bank. It is true, the answers plead a custom of banks receiving paper like the draft in question for transmission only, but in determining the sufficiency of the pleading all the facts pleaded must be taken together. The specific allegations of fact, setting out the indorsement, negative the idea that appellant was engaged as a forwarding agent merely. Were it conceded that the custom is well pleaded, it would be inconsistent with the specific allegation setting out the indorsement.

In a note to the case of *Allen v. Merchants' Bank*, 22 Wend. 215, 34 Am. Dec. 289, it is said: "Some, however, have seemed to suppose that banks do not undertake such collections, as they do other branches of their business, solely from motives of profit, but as an accommodation of their customers; and that as they have no ownership or interest in the paper collected, the pay is in a measure gratuitous unless extra commissions are charged. From this notion has no doubt sprung the disposition of some courts to hold banks to a less stringent accountability with respect to paper taken for collection than would be enforced against agents for hire generally in the management of the business of their principles. Such a notion, however, is entirely fallacious, as shown in the principal case. Banks are not in this, any more than in any other part of their business, charity institutions. They undertake collections, not from motives of benevolence, but because from long experience they have found it directly or indirectly profitable to do so. If they should find it unprofitable they would cease to perform the service, however advantageous it might be to the world at large. The benefit derived from the use of the money collected for the time that it may be left in

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their hands, the extension of their business, and the advantage of settling their accounts with distant banks, without being compelled to send money to and fro between them, by means of collections made in the places where such banks are situated, furnish ample consideration for the undertaking to collect. *Thompson v. Bank of South Carolina*, 30 Am. Dec. 354; *Reeves v. State Bank of Ohio*, 8 Ohio St. 465; *Titus v. Mechanics' National Bank*, 35 N. J. L. 588; 1 Dan. Neg. Inst., section 324."

There is a great conflict of authority on the question as to how far the first bank is to be held liable for the default of a correspondent bank. In the able briefs of counsel for appellant and appellee these cases are collected. There is a direct conflict, and text-writers are as far from agreeing on the question as the courts of the different states. Many of the states follow the courts of Massachusetts, which deny the liability of the bank, while an equally formidable array follow the New York and United States supreme courts, and affirm the bank's liability. The courts of several States follow the Massachusetts rule that the first bank is not liable. These authorities rest on the proposition that as the collection of a draft at a distant point cannot be made by the bank itself through any of its officers, but must be entrusted to a subagent, the holder of the draft impliedly authorizes the bank to employ a subagent, and that the risk of the subagent's neglect is then upon the holder of the draft; and further that the consideration, in the absence of an express or implied agreement for compensation, is inadequate from which to infer a contract to guarantee against loss. Counsel for appellant rely upon the case of *Bank of Washington v. Triplett*, 1 Pet. 25, as declaring the rule that the bank with which the note or draft is deposited for collection has no further duty

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therewith than to transmit to another bank. In that case a bill was placed in the hands of a bank in Alexandria for the purpose of being transmitted to a bank in Washington for collection, the Alexandria bank indorsing it in blank for that purpose. The Alexandria bank wrote a letter at the instance of the owner of the bill notifying the Washington bank how to proceed in the collection of the bill. In that case suit was brought against the Washington bank and not the Alexandria bank. In the opinion it is said: "The payees of the bill indorsed it in blank, and delivered it to the cashier of the Mechanics' Bank of Alexandria, for the purpose of being transmitted, through said bank, to a bank in Washington, for collection. * * * The bill was not delivered to the Mechanics' Bank of Alexandria for collection, but for transmission to some bank in Washington, to be collected."

In *Exchange National Bank v. Third National Bank*, 112 U. S. 276, the Pittsburg bank discounted, before acceptance, certain drafts and sent them to the New York bank for collection. The New York bank sent them to its correspondent, the First National Bank of Newark, N. J., for acceptance and collection. The drafts were drawn on "Walter M. Conger, Sec'y Newark Tea Tray Co., Newark, N. J." The drafts were presented by the Newark bank to Conger for acceptance, who, except in one instance, accepted them by writing on the face: "Accepted, payable at the Newark National Banking Co., Walter M. Conger." There was sufficient time before the time of payment to notify the Pittsburg bank the form of the acceptance and for said bank thereafter to give further instructions as to the form of acceptance. The Newark bank held the drafts for payment, but the Pittsburg bank was not notified of the form of the acceptance until two of the drafts were returned to it by the New York bank. At

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that time the drawees and indorsers were insolvent, but the drawees were solvent when the drafts were discounted. The drafts were protested for nonpayment, but none of them were paid. Suit was brought by the Pittsburg bank against the New York bank alleging negligence in not obtaining acceptance of the drafts by the Tea Tray Company, or having them protested for non-acceptance by that company, or giving notice of such non-acceptance, and in failing to give notice that the company would not accept the drafts, or that Conger would not accept them in his official capacity. It was earnestly contended that the liability of the New York bank in taking for collection these drafts on a drawee at Newark extended merely to the exercise of due care in the selection of a competent agent at Newark, and to the transmission of the drafts to such agent with proper instructions, and that the Newark bank was the agent of the Pittsburg bank and not the agent of the New York bank, and that due care having been used in selecting the agent the New York bank was not liable. In the opinion, the court said: "The question under consideration was not presented in *Bank of Washington v. Triplett*, 1 Pet. 25, for although the defendant bank in that case was held to have contracted directly with the holder of the bill to collect it, the negligence alleged was the negligence of its own officers in the place where the bank was situated. * * * The agreement of the defendant in this case was to collect the drafts, not merely to transmit them to the Newark bank for collection. This distinction is manifest; and the question presented is, whether the New York bank, first receiving these drafts for collection, is responsible for the loss or damage resulting from the default of its Newark agent. There is no statute or usage or special contract in this case, to qualify or vary the obligation re-

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sulting from the deposit of the drafts with the New York bank for collection. On its receipt of the drafts, under these circumstances, an implied undertaking by it arose, to take all necessary measures to make the demands of acceptance necessary to protect the rights of the holder against previous parties to the paper. From the facts found, it is to be inferred that the New York bank took the drafts from the plaintiff, as a customer, in the usual course of business. There are eleven drafts in the case, running through a period of over three months, and the defendant had previously received from the plaintiff two other drafts, acceptances of which it had procured from Conger, at Newark, through the Newark bank. The taking by a bank, from a customer, in the usual course of business, of paper for collection, is sufficient evidence of a valuable consideration for the service. The general profits of the receiving bank from the business between the parties, and the accommodation to the customer, must all be considered together, and form a consideration, in the absence of any controlling facts to the contrary, so that the collection of the paper cannot be regarded as a gratuitous favor. *Smedes v. Bank of Utica*, 20 Johns. 372, and 3 Cowen 662; *McKinster v. Bank of Utica*, 9 Wend. 46; affirmed in *Bank of Utica v. McKinster*, 11 Wend. 473. The contract, then, becomes one to perform certain duties necessary for the collection of the paper and the protection of the holder. The bank is not merely appointed an attorney, authorized to select other agents to collect the paper, its undertaking is to do the thing, and not merely to procure it to be done. In such case, the bank is held to agree to answer for any default in the performance of its contract; and, whether the paper is to be collected in the place where the bank is situated, or at a distance, the contract is to use the proper

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means to collect the paper, and the bank, by employing the subagents to perform a part of what it has contracted to do, becomes responsible to its customer."

In *Mackersy v. Ramsay*, 9 Cl. & Fin. 818, a bank in Edinburgh was employed to obtain payment of a bill drawn on Calcutta. The Edinburgh bank transmitted the bill to its correspondent in London who forwarded it to a house in Calcutta to whom the bill was paid, but that house having failed the Edinburgh bank was sued and was held liable on the ground that it was an agent to obtain payment of the bill and as payment had been made the bank's principal could not be called on to suffer any loss occasioned by the bank's subagents, between whom and the principal no privity existed. *Van Wart v. Woolley*, 3 Barn. & Cr. 439.

In *Titus v. Mechanics' National Bank*, 35 N. J. L. 588, the court said: "A dealer who deposits a draft on a distant city, in a bank in his own town, has no choice of their agent or correspondent. It is the business of a bank to provide proper agents or correspondents for this service, when they adopt it, as most banks do, as part of their regular business. If they have no such correspondent, they should refuse to take paper for collection, and then the holder could choose whether he would leave it for transmission. He would then be led to inquire about the agent to whom it would be transmitted. The English and New York rule is much better adapted to the convenient dispatch of business. It is no hardship on the bank; it can always look to its correspondent bank to which transmission is made, for indemnification from its neglect." The following authorities sustain the doctrine that the correspondent bank is the agent of the home bank and not the agent of the owner of the paper. *Davey v. Jones*, 42 N. J. L. 28, 36 Am. Rep. 505; *Allen v. Merchants Nat'l Bank*, 22 Wend. 215, 34 Am. Dec. 289; *Ayrault*

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v. *Pacific Bank*, 47 N. Y. 570, 7 Am. Rep. 489; *Castle v. Corn Exchange Bank*, 148 N. Y. 122, 42 N. E. 518; *St. Nicholas Bank v. State Nat'l Bank*, 128 N. Y. 27, 27 N. E. 849; *Naser v. First Nat'l Bank*, 116 N. Y. 498, 22 N. E. 1077; *Corn Exch. Bank v. Farmers Nat'l Bank*, 118 N. Y. 443, 23 N. E. 923; *Hoover v. Wise*, 91 U. S. 308; *German Nat'l Bank v. Burns*, 12 Colo. 539, 13 Am. St. 247, 21 Pac. 714; *Nat'l Exch. Bank v. Beal*, 50 Fed. 355; *First Nat'l Bank v. Craig (Kan.)*, 42 Pac. 830; *Thompson v. Bank of South Carolina*, 3 Hill 77, 30 Am. Dec. 354; *Power v. First Nat'l Bank*, 12 Pac. 597, 6 Mont. 251; *Simpson v. Waldby*, 63 Mich. 439, 30 N. W. 199; *Nat'l Citizens Bank v. Citizens Nat'l Bank (N. C.)*, 25 S. E. 971; *Bailie v. Augusta Savings Bank*, 95 Ga. 277, 21 S. E. 717; *Reeves v. State Bank*, 8 Ohio St. 465; *Hermann v. State Bank*, 10 Ohio St. 446; *Streissguth v. Nat'l German-American Bank*, 43 Minn. 50, 44 N. W. 797, 19 Am. St. 213; *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459; *Commercial Bank v. Union Bank*, 11 N. Y. 212; Daniel Neg. Inst., sections 324, 342, 344, 345; Rand. Com. Paper, sections 1457, 1458; Edw. Bills and Notes (2nd ed.), 383; Boone on Banking, sections 203, 204, 235.

The liability of a collection agency, to whom had been delivered a bill for collection, for the default of an attorney to whom the agency had sent the bill for collection, was established by a divided court in the case of *Hoover v. Wise*, 91 U. S. 308; but the liability of a bank for the default of a correspondent bank was established by a unanimous court in the case of *Exchange National Bank v. Third National Bank*, 112 U. S. 276. The United States Circuit and District Courts have approved the same doctrine. *National Exchange Bank v. Beal*, 50 Fed. 355. In the case of *Dunn v.*

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City National Bank, 58 Fed. 174, where a mercantile agency contracted with its subscribers under a written agreement, to communicate, on request, information as to the financial responsibility of merchants and manufacturers and expressly stipulated that the information was to be obtained mainly by subagents of its subscribers whose names were not to be disclosed, and that the "actual verity or correctness of the said information is in no manner guaranteed," it was held that the agency was not liable for loss occasioned to a subscriber by the acts of a subagent in furnishing false information.

Whether there is or is not a want of privity between appellee and the California bank does not affect appellee's rights as against appellant. The authorities seem to be agreed upon the proposition that an indorsement for collection simply does not pass title to the paper so indorsed, and those states which hold the first bank liable follow this doctrine. In the case of the *National, etc., Bank v. Hubbell*, 117 N. Y. 384, the court said: "The endorsement upon each piece of paper was for collection simply; and by virtue of that endorsement no title passed to the firm, but, on the contrary, it became simply the agent of the plaintiff to present the paper, demand payment thereof and remit to it. Under such circumstances the title to the paper remained in the party sending it." And as stated above the doctrine of the first bank's liability has long been established in New York. And in *First National Bank v. First National Bank*, 76 Ind. 561, it was held that the indorsement of a check for collection did not vest the title to it in the indorsee nor give it any right to the proceeds, and in that case the following doctrine in *Sweeney v. Easter*, 1 Wal. 166, is approved: "The words 'for collection' evidently

had a meaning. That meaning was intended to limit the effect which would have been given to the endorsement without them, and warned the party that, contrary to the purpose of a general or blank endorsement, this was not intended to transfer the ownership of the note or its proceeds."

Although the Massachusetts court has strenuously denied the liability of the first bank, yet that court holds that if an agent undertakes to do the work of his principal and employs a subagent to assist him, on his own account, he is answerable to the principal for the wrong-doing of the subagent, although the principal has knowledge of the fact of the employment of the subagent. *Barnard v. Coffin*, 141 Mass. 37, 6 N. E. 364. See, also, *Morgan v. Tener*, 83 Pa. St. 305; *Bradstreet v. Everson*, 72 Pa. St. 124; *Sweet v. Southworth*, 125 Mass. 417; *Dyas v. Hanson*, 14 Mo. App. 363. And the authorities which approve the Massachusetts doctrine give no good reasons why a bank should be excepted from the well established principle of law that every person is liable for the acts of such agents as he has selected, to transact such business as he has undertaken to transact for others.

Not only do we believe that the doctrine laid down in *Exchange National Bank v. Third National Bank*, *supra*, and in that of the great commercial center, New York, the better doctrine, and that a rule laid down by the highest court in the land upon a question that most frequently arises between persons residing in different states, should govern; but that a different doctrine cannot be declared in our own State without disregarding the adjudications of our own Supreme Court. In *Tyson v. State Bank*, 6 Blackf. 225, 38 Am. Dec. 139, a bill was left with a branch of the State Bank of Indiana for collection. The branch bank failed to present the bill either for acceptance or pay-

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ment, and in a suit by the indorsee the State Bank was held liable for the damages he had sustained by reason of the failure to present the bill. It is true, the State Bank undertook to make the collection, but in the opinion it is held: "The State Bank, through one of its branches, having undertaken, for a reasonable reward, to collect the plaintiff's debt, placed itself in the situation of an agent or attorney, who, for reward, undertakes to perform services for another in the line of his business or profession. He is bound to a faithful discharge of his duty, and is responsible to his employer for all damages arising from his neglect."

In approving the doctrine laid down in *Smede v. Bank*, 20 Johns. 372, the court, in *Tyson v. State Bank*, *supra*, said: "The court remarked that the custom of receiving notes for collection was not founded on mere courtesy, but with a view to the interests of the institution and was the source from whence profit may and did arise."

It is argued by appellant that *Tyson v. State Bank*, *supra*, although frequently cited in support of the doctrine of the first bank's liability, does not, in fact, so hold. But this question has been decided adversely to appellant's contention in *American Express Co. v. Haire*, 21 Ind. 4. In that case the court said: "In *Hoard v. Garner*, 3 Sandf. 179, the New York doctrine is stated thus, by Judge Sanford: 'The principle established by *Allen v. Merchants' Bank*, 22 Wend. 215, was, that the implied contract of the banker was an undertaking to do the thing itself, and was not the delegation of an agent or authority to procure the thing to be done; that the contract looked mainly to the thing to be done, and his undertaking was for the due use of all proper means for its performance; that it was not a contract only for the immediate services of the agent and his acting faithfully as the represent-

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ative of his principal; that in the latter case the responsibility ceases with the limits of the personal services undertaken; in the other it extends to cover all the necessary and proper means for the accomplishment of the object, by whomsoever used or employed.'

* * * Ohio follows the line of these decisions. *Reeves & Co. v. State Bank*, 8 Ohio St. 465. Indiana has followed the same line of decisions, as applicable to banks; *Tyson v. State Bank*, 6 Blackf. 225, and as applicable to attorneys; *Abbott v. Smith*, 4 Ind. 452." See *Chapman v. McCrea*, 63 Ind. 360; *First National Bank v. First National Bank*, 76 Ind. 561. The case of *Tyson v. Bank*, *supra*, commits Indiana to the rule that the first bank is liable for the default of its correspondent bank. 1 Morse on Banks and Banking, pp. 472-473, recognizes Indiana as committed to this rule by the cases above referred to. There is no reason on principle why the rule which declares the liability of collection agencies and attorneys for the default of subagents selected by them, should not apply to banks when they undertake to do precisely the same kind of service.

Comstock, J., concurs in the dissenting opinion.

ON PETITION FOR REHEARING.

ROBINSON, C. J.—In the original opinion of the majority of the court, it is stated at the outset that the question presented for determination is, "Did the appellant, in accepting for collection, in the ordinary course of business, the draft delivered to it by appellee, guarantee the solvency of the intermediate banks through which the said draft passed before it was finally presented to the drawee and paid?" The complaint is in two paragraphs, and the judgment of the trial court is reversed, with instructions to sustain the demurrer to each paragraph of the complaint.

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In both the opinion of the court and in the dissenting opinion one fact seems to have been overlooked.

In addition to the facts set out in the original opinion, and upon which it is said the complaint is predicated, the second paragraph contains these averments: "That on said day (July 10, 1893) and for a long time prior thereto, plaintiff had been and then was, a customer of said Irwin's Bank, doing a large amount of business with said bank, including loans, discounts, collections and deposits; that plaintiff for a long time prior to said day was in the habit of carrying large sums of money on deposit in said bank, on which plaintiff was allowed and received no interest; that in consideration of the premises the defendant had, prior to said 10th day of July, 1893, agreed with the plaintiff to make collections of all such claims as might be deposited by plaintiff in said bank for collection, without other charge therefor than the actual cost and expense incurred by said bank in the collection thereof; that, plaintiff's said contract still being in force and unrevoked, on said 10th day of July, 1893, deposited with defendant's said bank for collection their draft," etc. I think these averments in the complaint make a case different from that stated in the opinion. Here is an express contract between the parties. In the presence of such a contract, the commonly accepted mercantile usages and customs must give way. The above allegation clearly makes the second paragraph of complaint good. Where a contract is expressed as here, there is no room to reason out by inference what the agreement was. The parties themselves have spoken. Their agreement is expressed in terms. The consideration is agreed upon. In view of such facts, a court cannot take the conduct of the parties, and say that they did not mean what they said.

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Counsel for appellant have all along insisted, and I understand the original opinion so to hold, that their contract was one for transmission only. But I am unable to see how this can be true, when the second paragraph of complaint alleges an express contract to collect.

Courts denying the liability of the first bank recognize the effect of an express contract. Thus, in Pennsylvania, if a bank receives a reward for collecting, beyond the expense and mere nominal charge for service in forwarding, and employs a Virginia bank to collect the note, the Pennsylvania bank will be responsible for any negligence of the Virginia bank.

The author of *Morse on Banks and Banking* (3rd ed.), section 269, who so strenuously denies the first bank's liability, recognizes this distinction, and says: "If there is an express contract upon the matter of the first bank's responsibility, of course the question will be governed by it, and if the character of the contract and the consideration is such as to indicate such an interest, the first bank will be held liable, even in those states where upon the ordinary contract it is not held." For the reasons above stated I think the second paragraph of complaint is good, and that the petition for a rehearing should be granted.

Comstock, J., concurs in this dissenting opinion.

HARNESS ET AL. v. HORNE.

[No. 2,427. Filed May 10, 1898.]

BILLS AND NOTES.—Consideration.—Fraud.—The collection of a note given as part purchase money of an electric belt and truss business, including stock, material, and machinery on hand, cannot be defeated by proof of a statement made by the seller and payee of the note at the time of sale to the effect that the business was worth an amount greatly in excess of that realized therefrom by the purchaser, where the purchaser received substantially the articles mentioned in the inventory.

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From the Howard Circuit Court. *Reversed.*

C. N. Pollard, B. F. Harness and W. R. Voorhis,
for appellants.

B. Borders and James O'Brien, for appellee.

BLACK, J.—This was an action brought by the appellee against the appellants, Benjamin F. Harness and William W. Harness, upon a promissory note for \$500.00 made by the appellants to the appellee. The appellants answered by general denial and by a paragraph alleging want of consideration; and the appellant Benjamin F. Harness separately answered failure of consideration and also separately answered in two paragraphs by way of counterclaim for alleged fraud. The appellee replied, and the issues of fact were tried by jury. There was a special verdict, in which the facts were stated in substance as follows: On or about the 1st day of March, 1893, the appellee sold a certain electric belt and truss business, including stock, material and machinery on hand, at Chicago, to the appellant Benjamin F. Harness and one Charles E. Ellis, to each of them one-half thereof. Benjamin F. Harness paid the appellee \$2,000.00 in cash, and the appellants executed to him two promissory notes, one for \$500.00 due in six months, and one for \$500.00 due in one year, each with interest at six per cent. per annum, for the one-half of said business. These notes were signed by the appellant William W. Harness as surety. The former note was paid; the latter, being the note in suit, amounting with the interest thereon to \$587.00, was due and unpaid. The jury stated that there was not sufficient evidence to show what Ellis paid for his one-half interest in the business. About the time of this transaction, the appellee made out an inventory of the material and goods on hands, and delivered it or a copy of it, to Ellis or Benjamin F.

Harness. It was found that this inventory did not contain substantially a correct statement of the articles and goods so sold, but that the purchasers about that time received from the appellee substantially the articles and goods mentioned in the inventory. Soon after the sale, the purchasers incorporated the business under the name of The Dr. Horne Electric Belt and Truss Co. The stock of the corporation was divided into two hundred and fifty shares of \$100.00 each, said Ellis subscribing for one hundred and twenty-five shares, Benjamin F. Harness seventy-five shares and his wife fifty shares, the shares subscribed by Harness and his wife representing the whole interest so purchased by Benjamin F. Harness. The business was afterward carried on by this corporation. Benjamin F. Harness and his wife attending to the business at the home office, and Ellis attending to the advertising of the business; and up to the time Harness and wife sold their shares to one Gallear the corporation received \$4,507.47 in money from the sale of goods at retail and paid for advertising in goods taken out of the stock of the business a bill amounting to about \$2,400. It was found that at or prior to his said sale the appellee made false statements concerning said business; that he stated to Harness, for the purpose of inducing him to purchase the business, that said purchasers could easily clear \$10,000.00 a year out of the business; that the statements made to Benjamin F. Harness by the appellee at and before the sale, were not all substantially correct and true; that the appellee had conducted the business for ten years in Chicago; that Harness and Ellis and said corporation sold and disposed, at retail, of all the stock on hand, manufactured goods and material, except a small amount, for their own benefit, and afterward Harness and his wife sold their one-half of the stock

in the company to said Gallear for \$1,200; that the sole inducement for Gallear to make said purchase was the fact that he had about five hundred thousand names and addresses, worth from \$3,000 to \$5,000, which he could use in advertising the business, without paying out any money for advertising, and which were of no value to him in any other way. Benjamin F. Harness did not at any time offer to return anything which he had received from the appellee. It was found that prior to the appellee's sale, he represented to Benjamin F. Harness that the business was worth \$10,000 or more, and that he could make that amount per year in the business; that the appellee verbally insured him that he could do so; that the appellee represented to said Harness, before the purchase, that the former had names and addresses upon his books pertaining to said business, of the value of from \$5,000 to \$10,000 to said business. It was also found that said representations were made for the purpose of inducing said Harness to purchase the one-half interest in said business; that the representations were false; that Harness believed them to be true, and relied upon them as being true in making the purchase, and was induced by them to make the purchase. It was found that the first information Benjamin F. Harness had that the appellee desired to sell his business was obtained through Charles E. Ellis, in February, 1893; that Ellis at the time represented to said Harness that said business was of great value, and that a large amount of money could be made out of it, and immediately thereafter Ellis took Harness and his wife to the appellee's office and introduced them; that the statements and representations that had been made by Ellis to Harness were repeated at the office of the appellee, in his presence, and they were approved and sanctioned by the appellee as being true.

Prior to the time that appellee and Harness first met, the former had placed his said business in the hands of said Ellis for sale.

Ellis and Harness took charge of the business about the 1st of March, 1893, and operated it until about the 26th or 28th of April, 1894. During the time they carried on the business, the total expenditures therein amounted to \$7,430.68. The methods of advertising pursued by Ellis and Harness in carrying on the business were as good as those used by the appellee, or better. Ellis was an experienced man in the advertising business, and had been placing the advertising business for the appellee for a number of years. Ellis and Harness prosecuted the business with diligence and industry. It was found that one-half the interest in said business at the time of the sale by the appellee was worth nothing in cash, "the same being operated as a business by one who had no knowledge of the same;" that Benjamin F. Harness had no knowledge of the value of the business or of the goods on hand at the time of his purchase; that the labor and services rendered by Benjamin F. Harness and his wife during the fourteen months they were engaged in the business were of the value of \$2,100, and they received for said services from the proceeds of the business \$1,500 and no more. At the conclusion of the verdict it contained the following:

"If upon the answers to all the interrogatories herein the law is with the plaintiff, then we find for the plaintiff and assess his damages at \$587. But, if upon the answers to all the interrogatories herein upon the issues made by the complaint, the answer thereto and the reply, the law is with the defendants, we find for the defendants. And if, upon the answers to all the interrogatories herein, the law is with the defendant Benjamin F. Harness, upon the issues

made by the complaint, counterclaim and the reply thereto, we find for the defendant, and assess his damages at \$250." The court overruled a motion of the appellee for judgment in his favor upon the verdict for \$587, and a motion of the appellant Benjamin F. Harness for judgment in his favor upon the verdict for \$1,300, and the court rendered judgment in favor of the appellant Benjamin F. Harness for \$250 against the appellee. The appellant Benjamin F. Harness separately assigns as error the overruling of his motion for judgment in his favor on the verdict for \$1,300. The appellee has assigned cross-errors; among them, that the court erred in overruling his motion for judgment in his favor on the verdict for \$587.

There was, it appears, a sale of the business theretofore conducted by the appellee, and of the machinery, material and stock of manufactured goods. The appellant Benjamin F. Harness gave \$3,000 for the one-half interest purchased by him. It does not appear what Ellis gave for his one-half interest. The incorporated company having carried on the business more than a year, the appellant Benjamin F. Harness sold his interest, and that of his wife. The aggregate result was a pecuniary loss, for which he sought to reimburse himself in this action upon the note representing the balance of the price of the share purchased by him. It cannot be said that there was a want or failure of consideration. It was stated in the verdict that the one-half interest in the business was worth nothing in cash if to be operated as a business by one who had no knowledge of the business, and that Benjamin F. Harness had no knowledge of the value of the business or of the goods on hand.

We hardly need take space to analyze this finding for the purpose of showing that it does not amount to

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a finding that the business and goods, material and machinery, for which the note was given were absolutely without any value. It is shown that the corporation sold goods and material, and that the one-half of the capital stock was sold for a sum stated, and it appears that the purchasers received from the appellee what they contracted for. If it was not as valuable in their hands as they supposed or hoped, still it cannot be said that there was a want or failure of consideration. Many of the findings are manifestly immaterial. It does not appear that the inventory made out by the appellee was given or shown to Benjamin F. Harness, and it does not appear whether there was a list of more or less goods than were sold, but the purchasers received substantially the articles mentioned in it. There was no relation of trust or confidence between the appellee and Benjamin F. Harness. It is not shown that he did not know the relation of Ellis to the transaction, or that Ellis did not in good faith purchase a one-half interest and pay for it as much as was paid by Harness. It was found that Ellis represented to Harness that the business was of great value, and that a large amount of money could be made out of it, and his subsequent conduct tended to indicate the sincerity of Ellis. It appears that the appellee sanctioned as true these representations of Ellis, and that the appellee himself represented to Harness that the business was worth \$10,000 or more, and, in one finding, that Harness and Ellis could easily clear that amount a year out of the business, and, in another finding, that Harness could make that amount per year in the business, and, that the appellee verbally insured Harness that he could do so. It is also found that the appellee represented that he had names and addresses upon the books pertaining to the business of the value to the business of from

\$5,000 to \$10,000. It is not specifically found that the appellee did not have such names and addresses, and the representation may be considered as merely relating to their value. All the representations were mere statements of opinion. The statements of Ellis sanctioned by the appellee and the assurance of the appellee himself as to what might be realized in the future out of the business, were mere conjectures in relation to a future result dependent upon unknown contingencies. The representation that the business was worth \$10,000, though relating to the time of the making of the representation, was the statement of an opinion and not the representation of a material existing fact.

It is not denied by counsel that fraud may not be predicated of the statement of an opinion of value in general; but it is claimed that the business in question being one connected with a mode of application of electricity, the value was so exclusively within the knowledge of the appellee that this representation should be regarded as an exception to the general rule. There does not appear to have been any expression of opinion as to the value of machinery, material, manufactured goods, or of any method of manufacture or of the mode of application of electricity employed. The representation related solely to the value of the business, to ascertain which the usual methods of business men would have been sufficient, so far as appears. It is not shown that the appellee in any way prevented examination proper for obtaining such knowledge, or that such examination was not fully made by Harness. If he relied on such mere expressions of opinion as are shown in the verdict, he did so at his own risk. We see no reason why the appellee should not recover upon the note in suit. The judg-

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ment is reversed, and the cause is remanded with instruction to render judgment in favor of the appellee for \$587 and costs.

Wiley, J., took no part in this decision.

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[No. 2,433. Filed Feb. 16, 1898. Rehearing denied May 10, 1898.]

SPECIAL FINDINGS.—*Signature of Judge.*—Where it does not appear from the record that the judge who is shown to have tried the cause signed the special finding it will be treated as a general finding. *pp. 142-145.*

APPEAL AND ERROR.—*Record.*—*Correction.*—A record cannot be corrected in this court by affidavits, but must be corrected in the court below upon a writ of *certiorari*. *p. 145.*

From the St. Joseph Circuit Court. *Affirmed.*

A. L. Brick and Walter Funk, for appellants.

F. J. L. Meyer and Willis A. Bugbee, for appellees.

COMSTOCK, J.—Action by appellants against appellees for the enforcement of a material man's lien. Mortgagees and other lien holders were made parties defendants. The court made a special finding of facts, and in its conclusions of law thereon, held that the liens of the mortgagees were prior to those claimed by virtue of the mechanic's lien law, and rendered judgment accordingly. The only error assigned is, "that the court erred in its conclusions of law upon the facts found." Counsel for appellee contend that the questions sought to be presented by appellants are not before the court, because what is claimed to be a special finding is only a general finding, for the reason that it is not signed by the judge who presided at the trial.

The Hon. Lucius Hubbard was the regular judge of the court below, and the record shows that what purports to be a special finding of facts and conclusions

of law was signed by him. The record further shows that at the December term, 1895, it being the 29th day of January, 1896, the following proceedings were had in said cause: "Come the parties and submit this cause to the court for trial and the court is requested to find the facts specially and state its conclusions of law, and the court now takes this matter under advisement."

The next record entry is as follows: "And afterwards to wit, on Saturday, April 4, 1896, the same being the 24th day of the March term of the court aforesaid, before the Hon. Andrew Anderson, special judge, the following further proceedings were had in the above entitled cause: Come the parties, and the court files its special findings and conclusions of law thereon as follows." It is also recited in this entry that "said parties request the court to make a special finding of facts herein in writing and to state the conclusions of law thereon, and the court having heard the evidence, the argument of counsel, and being duly advised, makes and files in writing its special finding herein as follows." And then follows the special finding and conclusion of law thereon. This entry shows that the Hon. Andrew Anderson, special judge, presided in said cause; that he tried the same, and upon proper request made and filed his special finding and conclusions of law, and that he did not sign the special finding but that same was signed "Lucius Hubbard," the name of the regular judge.

It is the law in this State, that unless it appears from the record that the judge who is shown to have tried the cause signed the special finding the same will be treated only as a general finding. *McCray v. Humes*, 116 Ind. 103-111, and cases there cited; *Branch v. Faust*, 115 Ind. 464; *Conner v. Town of Marion*, 112 Ind. 517; *Thornton's Ind. Pract. Code*, section 551, note 2.

In *McCray v. Humes*, *supra*, which was a case like the one before us, the Supreme Court said at page 111: "The particular proceedings which include the special finding purports to have been held by Judge Paige, but the finding is signed 'T. J. Terhune,' without any explanation of record as to why it was so signed. * * * Consequently the questions sought to be made upon the special finding are not in the record. Besides, a special finding not signed by the judge, nor made a part of the record either by an order of the court or by a bill of exceptions, cannot be regarded as having been made in compliance with section 551 of the civil code, and hence must be treated only as a general finding. * * * As Judge Paige is made to appear as having presided in the cause when the special finding was made, his name, if any one, ought to have been attached to the special finding, and, upon its face, it is, in that respect, defective in not having been signed by him. Not having been otherwise made a part of the record, the special finding cannot be considered as anything more than a general finding in favor of the appellee."

If it appeared from the record that the proceedings were had before Judge Hubbard, the regular judge; that he had made and filed the special findings, and that the same was signed by him and that afterwards a special judge had rendered judgment thereon, such special finding and the conclusions of law would be in the record and would be treated as such and not as a general finding. If the judge of a court, regular or special, try a cause, and upon proper request, makes, files, and signs a special finding, all of which is shown by the record, and for any reason such judge is unable to act further in said cause, another judge, regular or special, can act in such cause until final judgment therein. If the judge who tried said cause should

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make, sign, and file such special finding and not state the conclusions of law thereon, his successor, whether a special or a regular judge, would be authorized to state the conclusions of law on such special finding and render judgment thereon. In this case, however, the record shows that the judge who made and filed what purports to be a special finding did not sign it and therefore it can only be treated as a general finding.

Affidavits have been filed in this court for the purpose of showing that the transcript does not correctly set forth the proceedings in the court below, and we are asked to decide the cause upon the facts thus shown, and not upon the record. Counter affidavits are also filed. If a transcript filed in this court is not a correct copy of the papers and entries in the trial court, it cannot be corrected in this court by affidavit, but on proper application a writ of *certiorari* will be issued, requiring the clerk of the court below to correct the transcript so that it correctly sets out the proceedings as shown by the record in the trial court. Elliott's App. Proc., sections 186-187.

If the record in the court below does not correctly set forth the proceedings, the application to correct the record must be made there; and if corrected in the court below, such corrected entry may be brought into the record in this court by *certiorari*. The supposed special finding being only a general finding, the assignment of error presents no question for our consideration. Judgment affirmed.

ON PETITION FOR REHEARING.

PER CURIAM.—The able brief of counsel for appellants in support of the petition for a rehearing in this cause does not show error in the statement of the rec-

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ord in the original opinion. The conclusion reached was solely upon the record. The record may not correctly set forth the proceedings in the trial court, but if errors of record exist, they must be corrected by the lower court. A rehearing cannot be granted to correct them. Petition overruled.

THOMAS' ESTATE v. SNYDER.

[No. 2,444. Filed May 10, 1898.]

APPEAL AND ERROR.—*Assignment of Error.*—*Waiver.*—Errors assigned are waived if not discussed. p. 147.

SPECIAL FINDINGS.—*Practice.*—Complaint cannot be made of the failure of the court to itemize in the special findings the several amounts for which judgment was rendered where no motion was made to that effect. p. 147.

EVIDENCE.—*Weight.*—The Appellate Court will not reverse a judgment on the weight of the evidence where there was some evidence to sustain the judgment. pp. 147, 148.

From the Tipton Circuit Court. *Affirmed.*

Swoveland & Pike and *R. B. Beauchamp*, for appellant.

Dan Waugh, J. P. Kemp and *J. N. Waugh*, for appellee.

COMSTOCK, J.—This is a claim of appellee against the estate of John Thomas, deceased, for work and labor performed for him, at his request, during his lifetime, amounting to \$3,796; for wheat furnished decedent during his life time of the value of \$44.08, and for taking care of the stock of decedent between the date of his death and the sale of the same, \$10.00. A demurrer to the complaint was overruled and the issue formed by general denial. The cause was submitted for trial to the court, and upon request of the defendant a special finding of facts was made and conclusions of law stated, upon which judgment was rendered in favor of appellee for \$2,049.

Appellant excepted to the conclusions of law, filed a motion for a *venire de novo*, a motion for a new trial, and a motion in arrest of judgment, all of which motions were overruled, to which rulings exceptions were duly taken. The only errors assigned upon appeal, which are discussed, are the overruling of the motion for a *venire de novo* and the motion for a new trial. The others, under the well known rule are waived.

The grounds for the motion for the *venire de novo* are: (1) That the special findings of the court are so defective, uncertain and ambiguous that no judgment can be rendered thereon; (2) "the findings contain the evidence and not the facts established by the evidence." Neither of these grounds can be maintained by the record.

Appellant's counsel, upon this assignment, say that as appellee's claim consists of many items of account extending over a period of many years, for different kinds of service, that the findings should have been definite as to the amount found due on each item. The court found the total amount due for work, and the separate amount due for wheat claimed by appellee. If the appellant desired an itemized statement of the amount allowed for each kind of service rendered, he should have moved the court for such finding. This was not done, and it is now too late to make complaint.

The reasons specified in the motion for a new trial are that the damages assessed are excessive; that the amount of recovery is too large; that the special findings of the court are not and each of them is not sustained by sufficient evidence; that the decision of the court is not sustained by sufficient evidence; that the decision of the court is contrary to law, and that the decision of the court is contrary to the evidence. In

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discussing this assignment of error, counsel for appellant say: "We are not seeking a reversal of the entire cause on account of the insufficiency of the evidence, or the want of evidence to support the finding and judgment of the court below, but ask a reversal on account of there being a want of evidence to support a portion of the judgment."

We have examined the evidence, and although it affirmatively appears from the record that all the evidence is not before us, and that there is some conflict as to the value of the services, there is evidence from which the court might have assessed the amount on which judgment was rendered, and under the rule that appellate courts will not weigh evidence, we cannot say that the amount of the judgment was excessive. We find no error. Judgment affirmed.

HYATT ET AL. v. THE CITY OF WASHINGTON ET AL.

[No. 2,463. Filed May 10, 1898.]

INJUNCTION.—Bond.—Attorney's Fees.—Attorney's fees for defending an injunction suit at the trial on the merits of the cause may be recovered in an action on the bond, although the injunction was not the sole object of the action. *pp. 149, 150.*

BONDS.—Names of Sureties in Body of Bond.—Injunction.—The fact that the names of the sureties on a bond filed in a suit for an injunction did not appear in the body of the bond cannot be questioned on appeal, where the court approved the bond upon issuing the restraining order. *p. 150.*

SAME.—Injunction.—Obligees.—Where the names of the mayor and marshal of a city were placed in a bond as obligees, filed in a suit against such city for an injunction, any rights under such bond would not accrue to such officers individually, but to them for the benefit of the city. *p. 150.*

From the Daviess Circuit Court. *Affirmed.*

A. J. Padgett and J. Alvin Padgett, for appellants.

C. K. Tharp, for appellees.

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ROBINSON, C. J.—Appellants, in a former suit, had obtained a temporary restraining order against appellees. The injunction bond was conditioned to pay appellees all damages and costs which might accrue to them by reason of the injunction, and restraining order which might be issued. On final hearing the injunction was dissolved. This action was brought upon the bond, to recover fees paid to counsel for services rendered at the trial of the case on its merits, which resulted in the dissolution of the injunction.

It appears that no motion was made nor services rendered in resisting or attempting to dissolve the temporary restraining order, and that the services rendered were at the trial of the case on its merits. And it is argued by appellant's counsel that such services do not come within the conditions of the bond, and that they are not damages resulting from the granting of the temporary restraining order. It is held that where the injunction is the sole object of the action, the necessity of paying counsel fees in defending the case on its merits is an actual damage sustained by reason of the injunction, and such fees may be recovered in an action on the bond. *Raupman v. City of Evansville*, 44 Ind. 392; *Noll v. Smith*, 68 Ind. 188. And it is further held that where other and additional relief is sought in such cases, counsel fees may be allowed, but that they should be restricted to such fees as are necessarily paid in defeating the injunction. And in the case at bar the record discloses that the trial court limited the recovery to the amount expended for fees on account of the injunction branch of the case. See *Robertson v. Smith*, 129 Ind. 422, 15 L. R. A. 273; 2 High on Injunctions, section 1688; *Swan v. Timmons*, 81 Ind. 243; *Beeson v. Beeson*, 59 Ind. 97.

While the above cases do not expressly so hold, yet, reasoning from the rules they declare, we are of the

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opinion that the correct rule is that attorney's fees for defending an injunction suit at the trial on the merits may be recovered in an action on the bond, although the injunction was not the sole object of the action.

The names of the sureties do not appear in the body of the bond, but that is not material, as the court approved the bond when the restraining order was issued. *Griffin v. Wallace*, 66 Ind. 410; *Potter v. State*, 23 Ind. 550.

Construing the complaint and the bond, filed as an exhibit, together, it is evident that the city of Washington is the real party in interest. There is, in effect, but one obligee named in the bond. Any right accruing to the persons named in the bond as obligees would not, by the express terms of the bond, accrue to them as individuals, but as officers of the municipality. The two persons named are designated as "mayor of the city of Washington" and "marshal of the city of Washington" respectively, and as individuals they have no connection with the matter. This fact clearly distinguishes the case at bar from *Hildrup v. Brentano*, 16 Ill. App. 443, set out at length in appellants' brief. Judgment affirmed.

THE UNION CENTRAL LIFE INSURANCE COMPANY v.
HOLLOWELL, ADMINISTRATOR.

[No. 2,432. Filed May 11, 1898.]

LIFE INSURANCE.—Representations.—Warranties.—The law regards representations made by the applicant in an application for insurance as a warranty to the insurer that the facts so stated are exactly as represented, and they must be literally true whether material or immaterial, or the policy is void. p. 153.

SPECIAL FINDINGS.—Reversal of Judgment on Weight of Evidence.—A judgment based upon a special finding of facts will not be reversed where there was evidence from which such facts could have been found. pp. 153, 154.

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LIFE INSURANCE.—Suicide.—Presumptions.—Where in an action on a life insurance policy the question is in issue as to whether the insured died from natural causes or committed suicide, the court will presume, in the absence of evidence, that he died from natural causes. *p. 154.*

SAME.—Payment of Premiums.—Special Findings.—The payment of premiums is an ultimate fact which the jury has the right to find in an action on an insurance policy. *p. 154.*

INTERROGATORIES TO JURY.—Practice.—Under the act of March 11, 1893, interrogatories which are not so framed that the jury will be required to find one single fact in answering each are properly refused. *pp. 154, 155.*

From the Putnam Circuit Court. *Affirmed.*

Charles E. Barrett, Ramsey, Maxwell & Ramsey, Holstein & Hubbard, Frank D. Ader and Henry Warrum, for appellant.

Benjamin F. Corwin, George W. Brill, George C. Harvey, Thomas J. Cofer and Cash C. Hadley, for appellee.

HENLEY, J.—This action was begun by the appellee upon a policy of insurance issued by the appellant to one John C. Koehler. The policy was issued on the 6th day of December, 1893, and on the 27th day of February, 1894, the said Koehler died. Payment of the policy by the appellant having been refused, this action was instituted by the administrator of the decedent. This cause is here for the second time. The opinion disposing of the first appeal will be found reported in the case of *Union Central Life Ins. Co. v. Hollowell, Admr.*, 14 Ind. App. 611. To the complaint of the appellee the appellant answered in three paragraphs, the first a general denial, the second pleading a condition of the policy sued on, which rendered it void if the person upon whose life the policy was issued committed suicide; the third alleged that the decedent had represented in his application for insurance that he was a total abstainer from the use of intoxicants, when in fact he was an intemperate man

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in that respect and a free drinker of intoxicants. There was a reply filed in general denial, and upon the issues thus presented there was a trial by jury, and a special verdict ordered returned under the act of 1895 providing for special verdicts by way of answers to interrogatories. Both parties moved for judgment upon the special verdict. The motion by appellee for judgment upon the special verdict was sustained, and that of appellant overruled.

The questions presented to the court by this appeal all arise upon the motion for a new trial. It is contended by counsel for appellant that there is no evidence to sustain the findings of the jury that John C. Koehler was a total abstainer from the use of intoxicants; that there is no evidence to sustain the findings of the jury that said Koehler died from natural causes or that he did not commit suicide, and that there was no evidence to sustain the finding of the jury that the premium due upon the policy had been paid. Appellee's counsel do not contend but that these are all material facts necessary to be found before a recovery could be had under the issues joined. There can be no doubt but that the jury have found all the facts necessary to a recovery by appellee. The findings are very clear and explicit upon all the material points, and the only question which arises thereon is whether or not there is any evidence to support the findings. Upon the question of whether or not the decedent was a total abstainer from the use of intoxicants, the jury found as follows:

"Inter. 30. At the time and date the said John C. Koehler made application to the defendant for insurance upon which the policy in suit was issued, was he a total abstainer in and from the use of alcoholic, malt or vinous liquors? Ans. Yes."

"Inter. 31. At the time and date of the application

of the said John C. Koehler for the insurance, on which the policy in suit was issued, was he, the said John C. Koehler, a total abstainer from the use of intoxicating liquors? Ans. Yes.”

“Inter. 32. At the time and date of the said John C. Koehler’s application to defendant for the insurance on which the policy in suit was issued, was he, the said John C. Koehler, addicted to the use of alcoholic, malt or vinous liquors? Ans. No.”

“Inter. 33. At the time of the said John C. Koehler’s application for the insurance upon which the policy in suit was issued, was he not in the habit of drinking beer? Ans. No.”

“Inter. 34. At the time of making the application to the defendant for the insurance policy sued on, did he, the said John C. Koehler, use intemperately alcoholic, malt or vinous liquors? Ans. No.”

The law regards representations made by the applicant in an application for insurance as a warranty to the insurer that the facts so stated are exactly as represented. They must be literally true whether material or immaterial, or the policy is void. *Phoenix Ins. Co. v. Benton*, 87 Ind. 132; *Mut. Benefit Life Ins. Co. v. Cannon*, 48 Ind. 264; *Pierce v. Empire Ins. Co.*, 62 Barb. 636; *Commonwealth’s Ins. Co. v. Moninger*, 18 Ind. 352; *Ohio Farmers’ Ins. Co. v. Bevis*, 18 Ind. App. 17.

The jury in this cause by its answer to interrogatory numbered thirty said that the representation made by the decedent was literally true. Is there any evidence to sustain this finding? There was evidence to show that decedent was in the habit of drinking beer, that he was drunk nearly every Saturday night, that he often went to his meals at the hotel where he boarded in such an intoxicated condition that he was hardly able to sit at the table and feed himself. On

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the other hand a large number of witnesses testified that they had often seen decedent and had never seen him intoxicated, had never detected the smell of intoxicants on his breath, and had known him to refuse to drink intoxicants when offered him. Seventeen witnesses testified that they were often in the company of decedent and that at no time did they ever know him to take any intoxicants or in any way show any sign of being intoxicated. One of these witnesses was the keeper of the hotel where decedent boarded during the time covering the period in which the policy in suit was issued to him. We cannot say that the findings of the jury upon this subject were unauthorized. It is a question of fact, and there was evidence from which the jury could have found as they did find.

Did decedent voluntarily take his own life? The presumption is that he did not. *Travelers' Ins. Co. v. Nitterhouse*, 11 Ind. App. 155; *May on Insurance*, section 325. The evidence upon this point is conflicting, and we will not disturb the finding of the jury.

The jury also found that the premium on the policy of insurance issued by appellant upon the life of decedent had been paid. Payment is an ultimate fact which the jury is authorized to find. *Wipperman v. Hardy*, 17 Ind. App. 142; *Braden, Admr., v. Lemmon*, 127 Ind. 9; *Thompson on Trials*, vol. 1, section 1253.

It is further contended that the lower court erred in refusing to submit certain interrogatories to the jury. These interrogatories were submitted to the jury under the special verdict act of 1895, one of the requirements of which is that, "The same shall be in the form of interrogatories so framed that the jury will be required to find one single fact in answering each of such interrogatories." Acts 1895, p. 248. Neither of the interrogatories refused complied with the statute, and the court properly refused them. The lower

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court did not refuse to allow counsel for appellant to discuss the interrogatories in their argument to the jury, and if counsel for appellee saw fit to discuss the interrogatories in their argument, we see no reason why appellant should complain. A careful examination of the entire record convinces us that the judgment of the lower court ought to be affirmed. Judgment affirmed. •

FOSTER v. LINDLEY.

[No. 2.487. Filed May 11, 1898.]

APPEAL AND ERROR.—*Final Judgment*.—An appeal cannot be taken from the action of the court in overruling a demurrer to a complaint.

From the Fountain Circuit Court. *Appeal dismissed.*

Livengood, Livengood & Dice, for appellant.

J. W. Brissey, for appellee.

WILEY, J.—This was an action by appellee against appellant to enforce and collect the penalty provided by section 1091a, Horner's R. S. 1897, for a failure to release of record a mortgage executed by appellee to appellant, and which it was alleged in the complaint had been fully paid; that a request to release had been duly made, and that appellant had neglected and failed to release the same. Appellant appeared to the action and challenged the sufficiency of the complaint by a demurrer, which demurrer was overruled and he excepted. This ruling is assigned as error. The record, as it comes to us, does not present any question for decision. The record shows that appellant filed his demurrer to the complaint, and the ruling thereon was as follows: "And the court, being fully advised in the premises, do now overrule said demurrer, and defendant by his counsel excepts and day is given." The record fails to show that any final

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judgment was rendered. and the precipe filed by appellant for a transcript directs the clerk to make a transcript of "the complaint, the demurrer and the order book entries and rulings of the court thereon."

Under the statute an appeal can only be prosecuted from a final judgment. See section 632, Horner's R. S. 1897. There are exceptions to this general statute governing appeals, as provided by section 646, Horner's R. S. 1897, but this appeal does not come within any of such exceptions. The ruling on a demurrer is not a final judgment within the meaning of section 632, *supra*, neither is it an interlocutory order, within the meaning of section 646, *supra*. As was said in *Slagle v. Bodmer*, 58 Ind. 465, the sustaining of a demurrer to a complaint without any further action thereon by the court, is not a final judgment from which an appeal will lie. See, also, *Brannock v. Stocker, Admr.*, 76 Ind. 573. In *Masten v. Ind. Car and Foundry Co.*, 19 Ind. App. 633, Comstock, J., speaking for the court, said: "The judgment from which an appeal may be taken must make a final disposition of the cause," and cites many authorities.

The overruling of a demurrer to a complaint, without further action of the court, is not a final disposition of a cause. The appeal is dismissed at the cost of the appellant:

ROBINSON & COMPANY v. NIPP ET AL.

[No. 2,339. Filed May 12, 1898.]

PRACTICE.—*Overruling Demurrer to Bad Answer.—Harmless Error.*—

Available error cannot be predicated on the action of the court in overruling a demurrer to a defective answer where plaintiff was not injured by such defect. *pp. 157, 158.*

PRINCIPAL AND AGENT.—*Acts Not Within Scope of Agent's Authority.*

—*When Principal Bound By.*—The authority of an agent must proceed from his principal, and in ascertaining the extent of his au-

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thority the court will look to what has been expressly or impliedly authorized before the performance of the act of the agent in question, and to the action of the principal in adopting or rejecting such act; if the subsequent conduct may be explained and understood in a sense consistent with a previously existing limitation upon the agent's authority, such subsequent conduct cannot furnish, as against the principal, a foundation for an implication of extended authority by way of ratification of an unauthorized act. *pp. 158-165.*

From the Henry Circuit Court. *Reversed.*

William A. Brown, for appellant.

M. E. Forkner and *J. H. Jones*, for appellees.

BLACK, J.—This was an action in which the appellant, a manufacturing corporation, sued the appellees upon a contract in writing called in the complaint a “promissory note,” but which was in the form of a bill of exchange accepted by the appellees.

The court overruled a demurrer of the appellant addressed to a number of paragraphs of answer separately. It is claimed in argument for the appellant that the sixth paragraph of answer was not sufficient to withstand a demurrer. It is admitted that this paragraph was technically sufficient as an answer of failure of consideration, but it is contended that it was not sufficient as an answer of set-off, or as a pleading showing ground for affirmative relief. However faulty the form of the pleading, especially as to its prayer, it is clearly shown by the record that there was no recovery against the appellant upon any pleading seeking affirmative relief for the appellees, and that the paragraph in question was treated on the trial as a pleading setting up merely matter of defense. This is not only indicated in the instructions given to the jury, but the verdict was general, “for the defendants,” and the judgment was “that the plaintiff take nothing by this cause of action, and that the defendants recover of and from said plaintiffs their

costs and charges herein laid out and expended." Therefore, if the sixth paragraph of answer was defective as claimed by the appellant, such defect did not work any injury to the appellant, and there was not, because of it, any available error in overruling the demurrer.

The appellant's motion for a new trial was overruled, and it is contended that there was error in the admission of certain evidence, over the appellant's objection. The so-called note was given with other like notes for the purchase money of a certain traction engine sold by the appellant to two of the appellees, the other appellees being sureties. To secure the payment of these notes, the buyers executed to the appellant a mortgage upon the purchased property and also a certain well-drilling machine with all tools belonging to and used in and about the same. The mortgage contained a provision that if default should be made in the payment of any of said notes, or any part thereof, or any interest thereon, the mortgagors should forfeit title to the mortgaged property and right to the possession thereof, and it should be lawful for the mortgagee, or the agent, attorney, legal representative, successors or assignees of the mortgagee to take immediate possession of the property without legal process, and, after giving such notice as is required by law from a sheriff in making sale of chattels, to sell the same at public auction, or so much thereof as should be sufficient to pay the amount due, or to become due, etc., the money remaining after paying said sums, if any, to be paid on demand to the mortgagors.

The traction engine was sold by the appellant to the mortgagors, under an order signed by the buyers and accepted by the seller, subject to a warranty contained in the order, that the engine was to be well built of

good materials. The order also contained a "notice" as follows: "The machinery above described is ordered, purchased and sold, subject to this warranty and no other, either express or implied. No agent or salesman has general agency powers, and is authorized only to make sales according to special instructions, and subject to the approval of the home office. All agreements must be in writing and contained in this order. No agent or salesman has power to bind the company by either verbal or written contracts or promises outside of this contract. This contract not to be binding on the company until accepted by Robinson & Co., at its home office, at Richmond, Indiana. It is hereby expressly agreed between the parties to this contract, that if anything except cash or notes is taken by the agent in whole or in part settlement for the machinery for which this order is given, Robinson & Co. are not to be liable for its return or its value in any event." There was evidence of a certain defect in the engine and of the giving of notice thereof to one John J. Wilkinson, a local agent of the appellant, and that a member of the company went to the place where the engine was kept by the buyers at a time when the first note given by appellees was due and unpaid; that the company through him entered into a conditional, written agreement with the buyers which by its terms was, when carried out, to constitute a full and complete settlement for all defects in the engine and claims under the warranty. This agreement provided for the repair of a specified defect in the engine by the appellant after the payment by the buyers of a certain amount upon the first note within a designated time, and contained stipulations for subsequent payments.

The buyers did not make the first payment so provided for, and the engine was not repaired. Some

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time after the expiration of the period given for making such payment, the mortgaged property, including the traction engine and the well-drilling machinery, mentioned in the mortgage, was taken away by said Wilkinson from the possession of the buyers, and the property was sold in the manner provided for in the mortgage and was bought in by the appellant for \$250, being less than the amount of said notes given by the appellees for the engine, which amounted to \$800.00. Thereafter this action was brought on one of the notes for \$350.00.

On the trial the appellees sought to establish that the property was so taken from the buyers under and pursuant to an agreement between them and the appellant, through said agent Wilkinson, for the release of the appellees and the surrender of the said notes in consideration of the surrender of said property by them; while on the part of the appellant it was sought to establish that the property was so taken and sold pursuant to the provisions of the mortgage, and not otherwise. In the course of the introduction on behalf of the appellees of the testimony of the appellee William Gray, one of the buyers, from whose custody the property was so taken by Wilkinson, the witness was permitted over the appellant's objection to testify that Mr. Wilkinson told the witness, "if we would let them have the engine and well machine without putting them to any further cost, that they would deliver the notes and cancel the debt."

The ground of objection urged was that it was not shown that Wilkinson had any authority to make such statement. The witness further testified that, in answer to this statement of Wilkinson, the witness told him "All right, to take it," and that Wilkinson then took the machinery. It appeared in evidence that Wilkinson was the agent of appellant in the lo-

cality in which the appellees lived, to which the engine was sent, when purchased of the appellant, and that he had been such for six years. It did not appear whether or not his appointment was written or oral. There was no evidence of the terms of his employment, and no evidence as to the nature of his authority in the matters in which he had been acting as agent during that period.

There was no evidence that the alleged settlement to which the witness testified had been ratified by the appellant with knowledge of the facts. It was not shown how the appellant had held out the agent in any other transactions. For the determination of the question whether or not it was shown that the agent had authority to make such a settlement or the buyers had a right to rely upon his possession of such authority by reason of the character in which he was held out by the appellant as its agent, we find no evidence in the record, except of matters connected with the particular transaction in which the note in suit was given.

We are inclined to think that the restrictions expressed in the "notice" contained in the order under which the engine in question was furnished so far related to the particular transaction of which the order formed a part, that it would not apply to transactions subsequent to a completed sale and delivery of the purchased property and the acceptance of notes and securities therefor, so as to negative conclusively the authority of the agent to make a settlement by accepting the surrender of the property upon an agreement to cancel the debt, if the evidence could be said to show that the appellant held out the agent as possessing authority to compromise on such terms. It was shown by the evidence that the buyers first nego-

tiated with Wilkinson for the purchase of the engine, and after talking with him, they went with him to the appellant's shops at Richmond, Indiana. They there examined the engine. The written order was then signed at that place, and there was evidence that the mortgage was also signed at the same time. A few days afterward the engine arrived at New Castle and was there taken from the cars by the buyers and Wilkinson, and was then by Wilkinson delivered to the buyers. The notes were thereafter delivered by the buyers to Wilkinson. One of the buyers notified Wilkinson of the defect in the engine. When the first note became due Wilkinson demanded payment of the buyers. He was told by the buyers of the defect, and examined the engine, and then notified the appellant, whereupon in April, 1895, Mr. Robinson, a member of the company and its manager of collections went to New Castle and in company with Wilkinson visited the buyers, and as a result of the interview, the compromise conditional settlement already mentioned was then signed by the buyers and by the appellant, through Robinson. After the time for the first payment under that agreement had expired, Wilkinson demanded payment of the amount which was thus past due. Afterward, in June, 1895, Wilkinson went to the buyers and demanded the property. It was then that, as claimed by the appellees, the agreement for the surrender of the property and the cancelation of the debt was made between Wilkinson and the buyers. Wilkinson, testifying as a witness, stoutly denied the making of this agreement, and said he had not authority to make such a settlement. Robinson also in his testimony denied his knowledge of the granting of such authority. There was no evidence whatever of express authority from the appellant for such a settlement. There was evidence that Wilkinson had au-

thority to collect the debt, and that the company sent him to see if the buyers had any money for him, and that he went several times to see them for such purpose. He was directed by the appellant's attorney to go and get the mortgaged property, and thereupon in June, 1895, he took the property from the buyers to his own farm, and after having advertised it for sale, by posting up notices in four public places, three in the township, he caused it to be sold at public auction. It was bought in by the appellant, and at the time of the trial it had been shipped to the appellant at Richmond. Thus it appears that Wilkinson procured the customer, the sale being made by the appellant itself. He assisted in the delivery of the property at New Castle, and received the notes given for the property sold. He demanded payment of the debt. Under instructions from the appellant's attorney, he took possession of the property and caused its sale, the taking possession and the sale being in accordance with the terms of the mortgage, his acts in the premises being referable to the provisions of the mortgage in the absence of evidence of other authority from the appellant to which they could be referred.

We have carefully searched the record, and while we find no indication as to how the appellant held out this agent to the public, we have stated in substance all that is shown as to the character of his connection with this transaction. The authority of an agent must proceed from his principal. In ascertaining the extent of his authority we must look to what has been expressly or impliedly authorized before the act of the agent in question, or to the conduct of the principal after the act in relation thereto, by way of adopting or rejecting it. If, as here, the subsequent conduct may be explained and understood in a sense

consistent with a previously existing limitation upon the agent's authority, such subsequent conduct can not furnish, as against the principal, a foundation for an implication of extended authority by way of ratification of an unauthorized act of the agent. The taking of the property, its sale, and its purchase by the appellant, were all consistent with the terms of the mortgage, and the conduct of the appellant in this regard cannot alone support an inference that the agent had authority to make such a settlement as that to which the appellee Gray testified. If such a settlement was made, the subsequent sale was an idle and inconsistent proceeding. The taking possession by Wilkinson upon the order of the appellant's attorney, and the subsequent sale after advertisement, considered as indications of authority of the agent, were not favorable to the appellees.

If the agent only had authority to sell, or to negotiate sales, and to collect the price, certainly he had no authority to cancel the debt upon the surrender to him of the property constituting a security for the debt, without some access of authority.

It is true that the liability of the principal for the conduct of the agent is not to be determined alone by the authority actually given to the agent, but the principal will be bound as if he had conferred the authority which the third person dealing with the agent was justified in believing to have been given to the agent; but the third person is thus justified not by the words or acts alone of the agent, but by the words or conduct of the principal. There must be an appearance of authority caused by the principal, and the agent must have acted within its scope. We cannot conclude that the settlement to which the witness Gray testified was shown to be within the scope of authority shown to

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have been possessed by the agent Wilkinson. The judgment is reversed, and the cause is remanded for a new trial.

Comstock, J., took no part in this decision.

CHANDLER v. PITTSBURGH PLATE GLASS COMPANY.

[No. 2,453. Filed May 12, 1898.]

NATURAL GAS.—Lease.—Title to Rents Accruing After Conveyance of Land.—Where an owner of land executes a gas lease, and afterward conveys the land the grantee is entitled to the rents maturing after the conveyance.

From the Howard Superior Court. *Reversed.*

B. C. Moon and *Conrad Wolf*, for appellant.

Blackledge & Shirley, for appellee.

COMSTOCK, J.—Appellant sued appellee to recover rents under a gas lease upon certain lands of which she is and was at the time of the commencement of this suit the owner. The lease provided for the annual payment of rent during its continuance. The question discussed is whether the owner of land, who has executed a gas lease, and afterward conveys the land, is entitled to the rents maturing after the conveyance, or whether they belong to the grantee. The trial court in sustaining the demurrer to the complaint held that the rents belong to the original lessor, though maturing after the conveyance. This decision was upon the theory that the contract in suit was one of sale, by which certain privileges pertaining to the land described therein were sold to the Diamond Plate Glass Company, and through it to the appellee, and that the relation of landlord and tenant was not created thereby. This precise question has not been passed upon, as we are advised, although in the recent case of *Swint v. McCalmont Oil Co.*, 184 Pa. St. 202, 38 Atl.

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1021, the supreme court of Pennsylvania assumed the right to the rents accruing subsequent to the deed to be in the grantee of the reversion of lands leased for oil purposes. The analogies support the proposition that the right to the rents accruing after the conveyance of the land is in the grantee. Rents are an incident to the ownership of the land. A lease to till gives the right to use the land for one purpose; a gas lease gives the right to use for another purpose. A conveyance of land leased for tillage or other use conveys to the grantee a right to all rents on the land thereafter maturing. *Lindley v. Dakin*, 13 Ind. 388; *Page v. Lashley*, 15 Ind. 152; *King v. Anderson*, 20 Ind. 385; *Allen v. Shannon*, 74 Ind. 164; *McClead v. Davis*, 83 Ind. 263; *Kellum v. Berkshire Life Ins. Co.*, 101 Ind. 455; *Swope v. Hopkins*, 119 Ind. 125; *Butt v. Ellett*, 19 Wall. 544; *Howland v. Coffin*, 9 Pick. 52; *Van Rensselaer v. Hays*, 19 N. Y. 68, 75 Am. Dec. 278; *Van Rensselaer v. Ball*, 19 N. Y. 100; *Perrin v. Lepper*, 34 Mich. 292; *McGuffie v. Carter*, 42 Mich. 497, 4 N. W. 211; *Hansen v. Prince*, 45 Mich. 519, 8 N. W. 584; *Page v. Culver*, 55 Mo. App. 606; *West Shore Mills Co. v. Edwards*, 24 Or. 475, 23 Pac. 987; *Springer v. Phillipps*, 71 Pa. St. 60; *Morrow v. Sawyer*, 82 Ga. 226, 8 S. E. 51; *Zink v. Bohn*, 3 N. Y. Supp. 4; Jackson & G. Landl. and Ten., sections 982-993; 12 Am. and Eng. Ency. of Law. p. 683. The statute has abolished the necessity for attornment. Section 7096, Burns' R. S. 1894. A transfer by inheritance of land leased for mining solid minerals transfers the right to undue rents. *Hendrix v. McBeth*, 61 Ind. 473, 28 Am. Rep. 680; *Hendrix v. Hendrix*, 65 Ind. 329; *McDowell v. Hendrix*, 67 Ind. 513. This rule was applied to rents maturing on land from an oil and gas lease thereon. *Woodburn's Estate*, 138 Pa. St. 606, 21 Am. St. 932, 21 Atl. 16. A conveyance by deed is as effect-

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ive as a conveyance by inheritance to transfer rents not accrued to the grantee. Sections 7096-7098, Burns' R. S. 1894. In *Manderbach v. Bethany Orphans' Home*, 109 Pa. St. 231, 2 Atl. 422, the court held that a conveyance of land upon which there was a flowing spring transferred the right to water rents thereafter maturing under a grant of perpetual right to use water therefrom for a yearly compensation. The same court in *Wettengel v. Gormley*, 160 Pa. St. 559, 40 Am. St. 733, 28 Atl. 934, held that a lease for gas or oil owing to the vagrant character of the substances partake of the character of a lease for general tillage rather than a lease for mining or quarrying the solid minerals.

The Supreme Court of this State holds that natural gas reduced to possession is personal property, but that the title does not vest in any private owner without it is reduced to actual possession. There can be no absolute, permanent property in natural gas until reduced to possession and placed under control. It is held to be a mineral, but of a peculiar kind. The title to it is likened to that in wild animals or fowls "in their fugitive and wandering existence," or in fish passing up and down a stream. See *State v. Ohio Oil Co.*, 150 Ind. 21, and authorities there cited. To construe the lease in question as a sale of the natural gas would be entirely inconsistent with the doctrine laid down in the case last cited.

The contract in question was for the use of land for the purpose therein named, and the right to the compensation agreed to be paid for its use accruing after the conveyance of the land was in the grantee. Judgment reversed, with instructions to overrule the demurrer to the complaint.

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NAMES v. THE STATE.

[No. 2,612. Filed May 12, 1898.]

ADULTERY.—Indictment.—Criminal Law.—An indictment for adultery which charges that the woman was then and there a married woman and the wife of one William Jones, sufficiently shows that the husband was living, and that they were not divorced. *pp. 168, 169.*

APPEAL AND ERROR.—Affidavits.—How Brought into Record.—Criminal Law.—Affidavits to sustain causes assigned for a new trial, in a criminal cause must be brought into the record by bill of exceptions. *p. 169.*

From the La Porte Superior Court. *Affirmed.*

Weir & Weir, for appellant.

W. A. Ketcham, Attorney-General, *Merrill Moores*, *John C. Richter* and *L. Darrow*, for State.

ROBINSON, C. J.—Appellant and one Anna Jones were indicted for adultery, and on motion for separate trials, appellant was separately tried resulting in a verdict of guilty and a fine of \$200 and imprisonment in the county jail for thirty days.

It is argued that there is no allegation in the indictment, that at the time of the alleged offense, Anna Jones had a husband living. Adultery is sexual intercourse between a married woman and any man other than her husband. *State v. Smith*, 18 Ind. App. 179; *State v. Chandler*, 96 Ind. 591. Upon the point in question the indictment charges that “the said Charles N. Names being then and there, etc., * * * and the said Anna Jones being then and there a married woman and the wife of one William Jones, did then and there live,” etc.

The language used necessarily implies that William Jones is living. A woman cannot be a wife unless she has a husband living. If he dies or they are divorced she is no longer his wife. A wife is a woman who has a husband living. The charge is not simply that she

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had been married, but that she was then and there a married woman and the wife of William Jones. The indictment is good. Gillett Crim. Law, section 193; *Crane v. People*, 168 Ill. 395, 48 N. E. 54; section 1964, Burns' R. S. 1894.

The only questions presented by counsel on the motion for a new trial are certain alleged errors of the court and misconduct of a juror. These do not appear in the record, except as set out in the motion for a new trial. Affidavits were filed in support of the motion for a new trial, but these have not been brought into the record by bill of exceptions. There is no bill of exceptions in the record, and nothing that purports to be a bill of exceptions. It is well settled that affidavits to sustain causes assigned for a new trial in a criminal case must be brought into the record by a bill of exceptions. Section 662, Burns' R. S. 1894 has no application to criminal cases. *Graybeal v. State*, 145 Ind. 623. Judgment affirmed.

SNELL v. MADDUX ET AL.

[No. 2,379. Filed March 15, 1898. Rehearing denied May 13, 1898.]

JUDGMENT.—Assignment.—In order to pass the legal ownership of a judgment the assignment must be made as provided by statute, but an equitable ownership may be obtained without compliance with the statute giving the assignee a right to sue on the judgment. *p. 170.*

PRACTICE.—Admission of Evidence.—Harmless Error.—Error cannot be predicated upon the admission of improper evidence where the improper statements made by the witness were proved by undisputed certified records. *p. 172, 173.*

From the Delaware Circuit Court. *Affirmed.*

C. B. Templer, for appellant.

James N. Templer & Son, for appellees.

ROBINSON, C. J.—It appears from the complaint that on the 2nd day of August, 1883, Lewis Maddux,

Thomas Maddux, Darwin F. Davis and Charles Locher were a copartnership in Cincinnati, Ohio, as the firm of Maddux Bros.; that on said date they recovered a judgment against appellant before a justice of the peace; that said firm afterwards became insolvent and made a voluntary assignment of all its property; that pursuant to an order of the probate court of Hamilton county, Ohio, the assignee sold all book accounts, judgments, etc., including said judgment against appellant; that appellees bought all of said property so sold and paid the full purchase price therefor; that said sale was approved by the court, and the assignee executed and delivered to appellees a written instrument assigning the title to said property to appellees, and delivered the possession to them; that since said time they have been and are the equitable owners of said judgment; that said judgment was not assigned by the statute of Indiana or at all except as aforesaid; that appellees are the sole owners of said judgment; that said judgment still stands on the docket of said justice in the name of said firm aforesaid; that the same is wholly unpaid.

The members of the old partnership were made defendants, and each answered separately admitting the allegations of the complaint to be true; that they had no interest in said judgment and that appellees were the owners thereof. Appellant answered in three paragraphs, and upon issues formed judgment was rendered against appellant. The only error assigned is overruling appellant's motion for a new trial.

In order to pass the legal ownership of a judgment it is necessary to make the assignment as provided by the statute. But even if the statute is not complied with, there may be enough to pass the equitable title and give the assignee a right to sue on the judgment. *Kelley v. Love*, 35 Ind. 106; *Wood v. Wallace*, 24 Ind.

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226; *Frybarger v. Andre*, 106 Ind. 337; *Adams v. Lee*, 82 Ind. 587; *Shirts v. Irons*, 54 Ind. 13.

It is argued that there is no evidence that appellees owned the judgment on which suit is brought, and that the evidence shows that the account on which the judgment was based was assigned after the recovery of the judgment; that the judgment never was assigned and that the assignment of the account would not carry the judgment.

It appears from the evidence that on the 16th day of April, 1885, Maddux Bros. executed a deed of assignment for the benefit of creditors to one Hinkle, of "all of the property and assets of said partnership of whatever nature or kind and wherever situated, consisting principally of the stock in trade of said partnership, * * * the book accounts and bills receivable of said business;" that the assignee afterwards petitioned the proper court and was ordered to sell the "desperate claims" due said firm; that in this list of desperate claims was "T. B. Snell, . . . \$45.11;" that these desperate claims were sold to appellees and that the assignee Hinkle executed a written assignment reciting, "For value received I hereby assign and transfer to Ann S. Maddux, Lauretta Maddux, Isadore Davis and Harriett V. Locher all the accounts and bills receivable referred to in the list of desperate claims of Maddux Bros. filed in the probate court of Hamilton county, Ohio, and sold at auction by its order;" that the entry of the claim on the books of Maddux Bros. at the time it was sold by the assignee was, "T. B. Snell, Muncie, Ind. Mem. March 27, 1883, to sight draft charged for balance bill Jan. 20, '83, \$45.11." A witness, D. F. Davis, who was the agent of appellees in the purchase, and who was a member of the firm of Maddux Bros., testified that the firm had sold Snell a bill of goods amounting to \$95.11, on

which \$50.00 was paid and the balance put into a judgment; that the Snell claim was sold by the assignee at public auction along with other accounts and judgments, and that he purchased for appellees and took an assignment of the Snell claim.

It is not denied that the judgment passed to the assignee under the general assignment. It appears from the evidence that Snell owed the assignee of Maddux Bros. a certain sum, and that the claim was sold by the assignee to appellees. Appellant does not claim that this amount or any part of it has ever been paid. It is not made to appear that the firm of Maddux Bros. has any creditors who have not been paid. The sale by the assignee by order of court was binding upon the creditors of the firm as well as upon the firm itself. The assignee had made final settlement of his trust before this suit was brought, and all the former owners of the judgment are made parties, and each answered disclaiming any interest in the judgment and admitting that appellees are the owners of the judgment. We think there is evidence in the record which warranted the trial court in holding that appellees are the equitable owners of the judgment, and as such owners may sue on the judgment. It does not appear that at the time this suit was brought any other parties were claiming to own or have any interest in the judgment.

The fourth cause for a new trial was permitting a witness to state what the assignee did with the claim against appellant, on the ground that such testimony is hearsay. The witness had purchased the claim for appellees and was certainly competent to testify as to facts within his own knowledge. The witness stated some facts which were not proper, but these facts were shown by certified copies of the records of the Ohio court, to which no objection was made. In such case

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the admission of such improper evidence is harmless error. *Citizens State Bank v. Adams*, 91 Ind. 280; *Holiday v. Thomas*, 90 Ind. 398; *Artel v. Chase*, 83 Ind. 546; *Naugle v. State, ex rel.*, 101 Ind. 284. The same rule applies to the other causes for a new trial argued by counsel, except the fifth, and in that the witness answered to the question objected to that he did not know.

We think the trial court correctly determined the merits of the cause, and that substantial justice has been done the parties. The record contains no error for which the judgment should be reversed. Judgment affirmed.

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[No. 2,458. Filed May 17, 1898.]

PRACTICE.—*Interrogatories to Jury.*—The time during the trial in which the request for answers to interrogatories to the jury shall be made is largely within the discretion of the trial court, and unless there is a clear abuse of discretion the action of the court will not be disturbed. pp. 174-176.

EVIDENCE.—*Weight Of.*—*New Trial.*—Where the evidence is conflicting, and there is some evidence to support the verdict, and the trial court has overruled a motion for a new trial asked because the verdict is not sustained by sufficient evidence, the action of the trial court is conclusive upon this court. pp. 176, 177.

PRACTICE.—*Setting Aside General Verdict.*—Where the facts found by answers to interrogatories were entirely inconsistent with the general verdict, and such facts were sustained by the evidence, no error was committed by the trial court in disregarding the general verdict and rendering judgment on the answers to the interrogatories. p. 177.

From the Marion Circuit Court. *Affirmed.*

Charles Martindale, for appellant.

F. Winters, C. M. Cooper and Harding & Hovey, for appellee.

ROBINSON, C. J.—Appellant brought this action against appellee, a director of a manufacturing com-

pany, to collect a statutory penalty for the violation of the provisions of the manufacturing and mining law. The complaint charges that the statute was violated, in that there was a failure to collect in the capital stock within eighteen months after the incorporation, and that by reason of such failure the corporation became insolvent, and that such omissions and violations were ordered and assented to by appellee as a director of such company, and that after such violations such company became indebted, in sums named, to appellant which said indebtedness is due and unpaid. One of the provisions of the statute is that the capital stock as fixed by the company shall be paid into the treasury thereof within eighteen months from the incorporation of the same. Section 5060, Burns' R. S. 1894. The section on which this action is based, 5076, Burns' R. S. 1894, provides that, "If any company organized and established under the authority of this act, and of the act of which this is supplementary, shall violate any of the provisions thereof, and shall thereby become insolvent, the directors ordering or assenting to such violation shall jointly and severally be liable, in an action founded on said acts, for all debts contracted after such violation as aforesaid." The jury returned a general verdict in appellant's favor and also returned answers to interrogatories. Appellant's motion for a new trial was overruled, and judgment rendered in appellee's favor on the answers to the interrogatories.

It is argued that the interrogatories were not properly submitted because no request in writing was made before the introduction of the evidence. The act of March 11, 1895, did not change the law as it then existed, giving the right to a party to have the jury find upon a part only of the material facts, but left the law in that respect substantially as it was

prior to the passage of that act. *Bower v. Bower*, 146 Ind. 393. So that the question here is to be determined without reference to that act.

It appears from the bill of exceptions that after the evidence had closed and before the argument was begun, counsel for appellee said, "We desire to present interrogatories to the jury, have not yet reduced them to writing, and will ask a few moments time for that purpose;" that thereupon the court suggested that the argument might proceed while counsel prepared the interrogatories, if counsel for appellant did not object, and that counsel for appellant could comment on them in his closing argument, to which counsel for appellant replied, "Very well, I will proceed," and made his opening argument; it further appears that the interrogatories were filed before the closing argument, were submitted to appellant's counsel before the closing argument, and were used and commented on by him in his closing argument and were submitted to the jury by the court without any objection. As appellant did not object and except to the action of the court at the time, but substantially agreed to the submission of the interrogatories, the error, if one was committed, is not now available to appellant. Nor is the right to submit interrogatories to the jury after the evidence is closed a question which goes to the jurisdiction of the subject-matter, and one which, therefore, would not be waived by a failure to object. The statute, section 555, Burns' R. S. 1894, does not designate the time when, during the trial, the request for answers to interrogatories shall be made, nor does the statute require that they be submitted to the opposite party. It is a matter necessarily largely within the discretion of the trial court and unless there is a clear abuse of discretion the action of the court will not be disturbed. Thus, in

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Sherfey, Admr., v. Evansville, etc., R. R. Co., 121 Ind. 427, interrogatories were submitted before the commencement of the argument, and during the closing argument counsel took the interrogatories, filled certain blanks, and added two others to the list, and returned them to the court without calling the attention of the opposing counsel to the fact, and the court submitted them to the jury to be answered, it was held that it was within the discretion of the court to submit them to the jury and require them to be answered, if presented after the argument is in progress. See, also, *Stockwell v. Thomas*, 76 Ind. 506; *Kopelke v. Kopelke*, 112 Ind. 435.

The answers to the interrogatories show that in July, 1889, the D. E. Stone Furniture Company was incorporated with a capital stock of \$50,000.00; that the entire capital stock was issued to a number of persons named, among them appellee, who paid the company the full face value of his stock; that appellee first became a director of the company in January, 1890; that during the time appellee was a director a part of the stockholders were insolvent so that the amounts unpaid upon their stock could not have been collected by process of law, and during said time all the other stockholders were solvent, and their unpaid stock collectible; that while appellee was a director all the other directors, who owned a large majority of the stock and who had not paid the same in full, were insolvent; that there was never a time while appellee was director when he could have procured a majority of the board of directors to have taken action to collect from the delinquent stockholders the amount due from them for stock, that appellee never ordered or assented to the failure of the company to collect the full amount due upon the stock it had issued.

It is argued that the verdict is not sustained by suf-

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ficient evidence. The burden was upon appellant to show, among other things, that the capital stock of the corporation was not paid into the treasury of the company within eighteen months from the incorporation, and that thereby the corporation became insolvent and that appellee was at such time a director and in such capacity ordered or assented to the noncollection of said capital stock. The evidence upon this question was conflicting, and was left to the jury under proper instructions. This court cannot weigh the evidence. Where the evidence is conflicting and there is some evidence to support a verdict, and the trial court has overruled a motion for a new trial asked because the verdict is not sustained by sufficient evidence, the action of the trial court is conclusive upon this court. *Deal v. State*, 140 Ind. 354.

No complaint is made of the instructions given to the jury by the court, and they were certainly as favorable to appellant as could have been asked. The answers of the jury to the interrogatories are supported by some evidence. The facts found in the answers to the interrogatories are entirely inconsistent with the general verdict. The essential fact that the violation of the statute was ordered or assented to by appellee is negated by the jury, and we cannot but conclude that the trial court did right in rendering judgment in appellee's favor upon the answers to the interrogatories notwithstanding the general verdict. Judgment affirmed.

BUCHER ET AL. v. THE CITY OF SOUTH BEND.

[No. 2,475. Filed May 17, 1898.]

MUNICIPAL CORPORATIONS.—*Negligence*.—A city is not liable for an injury sustained by a person caused by slipping upon a loose brick
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in the sidewalk which turned under her foot, where no defect was apparent in the sidewalk, and the city had no knowledge of the defect.

From the St. Joseph Circuit Court. *Affirmed.*

George E. Clarke and Joseph G. Orr, for appellants.
Wilbert Ward, for appellee.

COMSTOCK, J.—Appellants brought this action as husband and wife to recover damages for injuries sustained by the wife by reason of a fall on a defective sidewalk. The cause was tried by a jury, a special verdict returned, upon proper request, on which the court rendered judgment in favor of the defendant. The errors assigned are the overruling of appellants' and the sustaining of appellee's motion for judgment on the special verdict, and overruling appellants' motion for a new trial. The findings of the special verdict show that the appellant received her injuries on the 30th day of May, 1895, in the forenoon, while walking on a brick sidewalk on "Colfax," a much traveled public street of the defendant city. She was thirty-seven years old and in the full possession of all her senses.

From the interrogatories and answers thereto returned by the jury, we set out the following: "Was there some years before May 30, 1895, a driveway across the sidewalk on the north side of the street known as 'Colfax Avenue?' Yes." "Had the passage of vehicles on said sidewalk caused a depression to become worn in said walk at said driveway? Yes." "Was the depression in said sidewalk on and before the 30th day of May, 1895? Yes." "Were there on May 30, 1895, a number of loose bricks in said sidewalk at a point immediately west of the driveway, and within three feet of said driveway, and extending from the outer edge of said walk nearly to the center? Yes: we find some broken brick at this point."

"Were there, on May 30, 1895, a number of broken bricks in said sidewalk at a point immediately west of the driveway, and within three feet of said driveway, and extending from the outer edge of said walk nearly to the center? Yes; we find some broken bricks at this point." "Did such defective condition of said walk at that point exist for one or more months prior to the 30th day of May, 1895? Yes." "Did the authorities of the city of South Bend have knowledge of such defective condition of said walk at said point immediately west of, and within three feet of the west line of said driveway, before the 30th day of May, 1895? Yes." "Did the defendant city repair said defect in said sidewalk prior to May 30, 1895? No." "Did plaintiff, Alice Bucher, on the 30th day of May, 1895, step on a loose brick in said sidewalk at a point west of the driveway, and within three feet from the west line of said driveway? Yes."

"Did said brick in said defective sidewalk turn under said Alice Bucher's foot and cause said Alice Bucher to receive an injury to said foot? Yes." "Did the plaintiff, Alice Bucher, have any knowledge of the defective condition of said sidewalk at any time prior to the time of receiving said injury? No." "Was the plaintiff, Alice Bucher, at the time of receiving said injury, walking along said sidewalk in a careful and prudent manner? Yes." "Was it (the sidewalk) an old or new sidewalk? An old sidewalk." "Were any of the bricks out of the walk at the place where the accident occurred? No." "Was there any depression in the walk at the place where the accident occurred? No." "Had anything happened to the walk during the three or four months preceding the time of the accident which loosened the bricks in the walk at the place where the accident occurred? No." "Was the brick on which plaintiff,

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Alice Bucher, stepped when the accident happened, a part of the sidewalk? Yes." "Was that brick on a level of the sidewalk or in a depression? On a level with the sidewalk." "Was that brick completely surrounded by other bricks? Yes." "Did plaintiff, Alice Bucher, see the brick before she stepped on it? No." "Was there any abrupt place in the sidewalk at the point where the accident occurred? No." "Was there any unevenness in the sidewalk at the place where the accident occurred other than that caused by wear and constant use? No." "What was the greatest depression in the walk? From two and a half to three inches in the driveway."

Cities are not insurers of the safety of their streets. They are required to use reasonable care to keep them in a safe condition for travel, in the ordinary modes, by day and by night, and for the negligent failure so to do they are liable to one so traveling and exercising reasonable care who is injured by reason of their negligence. 24 Am. and Eng. Ency. of Law, p. 90; *Town of Gosport v. Evans*, 112 Ind. 133, 2 Am. St. 164, and authorities there cited.

From the findings of the special verdict it appears that the plaintiff Alice Bucher received an injury by slipping upon a loose brick which turned under her foot. This brick was a part of an old sidewalk and was on a level with and completely surrounded by other bricks composing the sidewalk. There were no bricks out of the walk or an abrupt place in the sidewalk at the place where the accident occurred. There were loose and broken bricks in the sidewalk, and a depression, but not at the point where the plaintiff received her injury. It does not therefore appear that the injury complained of was occasioned by a defect in the sidewalk which was apparent. At that point the walk was even and was in fair condition, excepting

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natural wear from long usage. There is no finding that it was known to the city.

It would be a severe rule which would require a city, by its officers, to examine each brick in a sidewalk to ascertain its condition, when there was nothing to indicate a defect in the brick itself, or in the manner in which it was laid, and where the walk was even. The trial court did not err in rendering judgment for appellee. Judgment affirmed.

HUBBS ET AL. v. THE STATE, EX REL. KURTZ, TRUSTEE.

[No. 2,662. Filed May 17, 1898.]

PRACTICE.—*Motion to Dismiss.*—A motion by defendant to dismiss an action for the reason that the demand was paid off, is properly overruled. *pp. 181, 182.*

NEW TRIAL.—*Motion for.*—A motion for a new trial for the reasons that “the finding and judgment of the court is contrary to the evidence,” and “the finding and judgment of the court is contrary to law,” does not state a ground for a new trial under section 568, Burns’ R. S. 1894. *p. 182.*

From the Perry Circuit Court. *Affirmed*

William A. Land, William Henning and Edwin C. Henning, for appellants.

Sol. H. Esarey, for appellee.

BLACK, J.—This was an action upon the bond of a township trustee, on the relation of his successor in office.

Upon the appearance of the appellants they moved to dismiss the action, “for the reason,” as stated in the motion, “that the same has been paid off in the sum of \$3,500, and that the costs of this action shall be adjudged against the defendants.” This motion having been overruled, issues were formed, which were tried by the court, the finding being against the appellants. The court having rendered judgment upon

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the finding, the appellants moved for a new trial, "for the following reasons: First. The finding and judgment of the court is contrary to the evidence. Second. The finding and judgment of the court is contrary to law." This motion having been overruled, the defendants appealed to the Supreme Court. The cause has been transferred from that court.

There was no error in the overruling of the motion to dismiss. The statement that the demand had been paid off was an assertion not in any proper manner established, and the correct method of establishing it was by proof under an answer setting up the fact as matter of defense upon the merits. Such matter is not proper ground for dismissal. So, also, there was no error in overruling the motion for a new trial. The only recognizable reasons for a new trial which can be supposed to have been contemplated by the appellants are those comprehended in the sixth subdivision of the causes for a new trial in section 568, Burns' R. S. 1894 (559, Horner's R. S. 1897), as follows: "Sixth. That the verdict or decision is not sustained by sufficient evidence, or is contrary to law." The word "decision" is used in this clause of the statute in the sense of finding upon the facts where the cause is tried by the court. *Wilson v. Vance*, 55 Ind. 394; *Christy v. Smith*, 80 Ind. 573; *Rosenzweig v. Frazer*, 82 Ind. 342; *Rodefer v. Fletcher*, 89 Ind. 563. The motion before us did not state a ground for which a new trial may be granted under the statute. The judgment is affirmed.

BEASLEY v. PHILLIPS.

[No. 2,492. Filed May 18, 1898.]

COVENANTS.—*Breach Of.—Deeds.—Remote Grantor.*—Covenants in a deed run with the land, and a grantee may sue a remote grantor for a breach of such covenants. pp. 184, 185.

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COVENANTS.—*Breach Of.—Damages.—Measure Of.—Remote Grantor.*

—In an action against a remote grantor for breach of covenants of warranty in a deed of conveyance, the measure of damages which plaintiff is entitled to recover is the amount he was compelled to pay to protect his title. *pp. 186, 186.*

SAME.—*Breach Of.—Complaint.—Answer.*—An answer to a complaint for a breach of covenants of warranty in a deed of conveyance admitting that defendant did not have title to a certain undivided interest in the real estate conveyed, but that both she and plaintiff knew of such fact at the time the conveyance was made, and that an agreement was made relative thereto, is contradictory of the deed containing covenants of warranty, and does not constitute a defense to such cause of action. *pp. 186-188.*

APPEAL AND ERROR.—*Practice.*—The appellate tribunal may look to a special finding of facts or a special verdict to determine whether the ruling on a demurrer to a pleading was prejudicial to the complaining party, and if it appears from the findings that the complaining party was not injured by such ruling, error cannot be predicated thereon. *p. 188.*

COVENANTS.—*Breach Of.—Eviction.*—The covenants of warranty in a deed of conveyance is an assurance by the grantor that the grantee shall enjoy the same without interruption by virtue of a paramount title, and a recovery may be had for a breach of such warranty without actual eviction. *pp. 190, 191.*

From the Gibson Circuit Court. *Affirmed.*

Lucius C. Embree, for appellant.

John M. Vandever and *Simon L. Vandever*, for appellee.

WILEY, J.—Appellee was plaintiff below, and sued appellant for an alleged breach of warranty of title. The complaint was in two paragraphs, which were held good on demurrer. Appellant answered in six paragraphs, to the second, third, and fifth of which a demurrer was overruled, and sustained as to the fourth and sixth. Appellee replied by general denial, and upon the issues thus joined, trial was had by jury, and a special verdict returned. Appellant's motion for judgment on the special verdict was overruled, and a like motion of appellee was sustained. Appellant has assigned all these adverse rulings as error. No

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objection is urged as to the first paragraph of complaint.

The second paragraph of complaint avers that in consideration of \$275.00 paid appellant by appellee, the former conveyed, by deed with covenants of warranty, certain real estate to the wife of appellee. That after said conveyance, for the purpose of vesting the legal title of said real estate in appellee, his said wife, with him joining, conveyed the same to one Chapman, who on the same day conveyed it to appellee; that there has been a breach of the warranty in said conveyance of appellant to appellee's wife, in that at the time said conveyance was made, the heirs of one Lydia Robinson, deceased (naming them), held and owned a paramount title in fee simple in and to the undivided one-third of said real estate, and that appellee suffered an eviction by said heirs, who demanded possession thereof and threatened to sue appellee for possession and partition thereof; that appellee notified appellant of said demand and threats, and demanded of her that she make good her covenants of warranty, which was refused, and to avoid a partition of said premises and an eviction thereof by legal process, appellant purchased of said heirs the outstanding paramount title held by them, and was compelled to and did pay them therefor \$65.00, etc.

The objections urged against this paragraph of complaint are: (1) That it shows upon its face that appellee was a mere volunteer, and that he did not pay anything for the conveyance whereby the title passed from his wife to him; and (2) being a remote grantee, he cannot recover any greater sum than the price which he himself paid to his immediate grantor. We do not think this contention can be maintained, and appellant has not cited us to any authority which even

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tends to support it. We think the questions are put at rest by the statute and repeated decisions under it.

Section 3346, Burns' R. S. 1894 (2927, Horner's R. S. 1897), prescribes the form of a warranty deed, and when such deed has been dated, duly signed, sealed and acknowledged by the grantor, it is declared by the statute that it "shall be deemed and held to be a conveyance in fee simple to the grantee, his heirs and assigns, with covenant from the grantor for himself and his heirs and personal representatives that he is lawfully seized of the premises, has good right to convey the same, and guarantees the quiet possession thereof; that the same are free from all encumbrances, and that he will warrant and defend the title to the same against all lawful claims."

A deed in the form prescribed by statute for warranty deed has frequently been held to covenant that the grantor is seized of the premises, has a good right to convey, and guarantees the quiet possession thereof; that the lands are free from encumbrances and that the grantor will warrant and defend the title against all lawful claims. *Carver v. Louthain*, 38 Ind. 530; *Coleman v. Lyman*, 42 Ind. 289; *Kent v. Cantrall*, 44 Ind. 452; *Keiper v. Klein*, 51 Ind. 316; *Jackson v. Green*, 112 Ind. 341. Covenants in a deed run with the land, and a grantee may sue a remote grantor for a breach of such covenants. *Dehority v. Wright*, 101 Ind. 382; *McClure v. McClure*, 65 Ind. 482; *Sage v. Jones*, 47 Ind. 122. In *McClure v. McClure*, *supra*, it is expressly held that a grantee in a warranty deed may sue his immediate or remote grantor for a breach of the covenants. It seems plain from the statute and these authorities, that appellant's objections to the second paragraph of the complaint are not well taken. Appellee's measure of damages here, is what he was compelled to pay to pro-

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A deed in the form prescribed by statute for warranty deed has frequently been held to covenant that the grantor is seized of the premises, has a good right to convey, and guarantees the quiet possession thereof; that the lands are free from encumbrances and that the grantor will warrant and defend the title against all lawful claims. *Carver v. Louthain*, 38 Ind. 530; *Coleman v. Lyman*, 42 Ind. 289; *Kent v. Cantrall*, 44 Ind. 452; *Keiper v. Klein*, 51 Ind. 316; *Jackson v. Green*, 112 Ind. 341. Covenants in a deed run with the land, and a grantee may sue a remote grantor for a breach of such covenants. *Dehority v. Wright*, 101 Ind. 382; *McClure v. McClure*, 65 Ind. 482; *Sage v. Jones*, 47 Ind. 122. In *McClure v. McClure*, *supra*, it is expressly held that a grantee in a warranty deed may sue his immediate or remote grantor for a breach of the covenants. It seems plain from the statute and these authorities, that appellant's objections to the second paragraph of the complaint are not well taken. Appellee's measure of damages here, is what he was compelled to pay to pro-

tect his title, and the covenants of warranty in appellant's deed, though he was a remote grantor, must be held to inure to the benefit of appellee. By the conveyance to appellee, he became possessed of the title which his wife had, and succeeded to her rights as a remote grantee. The demurrer, therefore, to the second paragraph of complaint was properly overruled.

Appellant's answer was as follows: Par. 1. General denial. Par. 2. Plea of payment. Par. 3. That when demand was made upon appellee by the heirs of Lydia Robinson, as averred in the complaint, and when payment was made to them as charged, appellee and those through and under whom he claimed title had been in the continuous and adverse possession of said real estate for over twenty years, claiming ownership, and by reason thereof were the exclusive owners, etc. Par. 4. That on February 2, 1894, appellant was in exclusive possession of said real estate, under and by virtue of a deed from one George Arnold; that said appellee was the husband of one Mary E. Phillips; that both appellee and appellant well knew the title of appellant was in dispute by the heirs of said Lydia Robinson, and was possibly defective as described in the complaint; that with a full knowledge of said fact, appellee and appellant agreed that said real estate should be conveyed to appellee's wife, by warranty deed, by appellant and husband, in consideration that appellee would pay appellant \$275.00, and in the event said heirs should assert a valid claim to the undivided one-third of said real estate, appellee was, for the purpose of securing to his said wife, a full and effective title to said lot, to pay to appellant such further sum as should be found to be necessary to purchase said outstanding title of said heirs; that, in pursuance to said agreement, appellant and her husband made said conveyance; that when said heirs asserted

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their title, in pursuance of said agreement, appellee went to them and procured from them deeds of conveyance for their interest in said lots and paid therefor the amount named in the complaint; that no part of the consideration for appellant's said deed was paid by the wife of appellee, but it was all paid by appellee pursuant to said agreement, and there was no consideration by any one for the other deeds mentioned in the complaint. Par. 5. That the contract of warranty made by appellant was without any consideration whatever. Par. 6. That the only demand made by the heirs of Lydia Robinson was for partition of the real estate described, and that when said demand and payment were made, appellee, and those through whom he held and claimed title, had been in adverse, exclusive and hostile possession for more than fifteen years, claiming the sole and exclusive ownership thereof, and that said heirs had no cause of action for the partition of said lot or to quiet title thereto, etc.

We will first dispose of appellant's contention that the court erred in sustaining the demurrer to the fourth and sixth paragraphs of answer. The theory of the fourth paragraph of answer is that when appellant made the conveyance to appellee's wife, it was agreed and understood between appellant and appellee that the heirs of Lydia E. Robinson might assert title to an undivided one-third interest in the real estate, and that in the event they did and it was necessary, appellee was to acquire from them such outstanding title and pay therefor, as a part of the consideration for the conveyance from appellant to appellee's wife.

We do not think the facts stated in this paragraph of answer constituted a defense to appellee's cause of action. The answer is contradictory of the deed. All oral negotiations and agreements between them were

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merged in the deed, and we must look to its terms alone for the covenants, conditions and agreements by which they bound themselves. See *Ice v. Ball*, 102 Ind. 42; *Bever v. North*, 107 Ind. 544; *Phillbrook v. Emswiler*, 92 Ind. 590; Greenl. Ev., vol. 2, section 244. The cases just cited are directly in point and decisive of the question under consideration. In the paragraph of answer we are now considering, appellant avers that she did not have title to an undivided interest in the real estate conveyed, and that both she and appellee knew such fact. But by her deed she says she had title, and covenants to defend and make it good. She is thus estopped from denying that she did not have title when she conveyed. See *Burton v. Reeds*, 20 Ind. 87; *Locke v. White*, 89 Ind. 492. She cannot thus be permitted to contradict or annul her express warranty, and as to this question, we must regard the deed as the contract between the parties. The demurrer was properly overruled.

As to the sixth paragraph of answer, the special verdict makes it unnecessary for us to pass upon its sufficiency, as every fact upon which the answer rests is fully found and set out in the verdict. Under the rule in this State, the appellate tribunal may look to a special finding of facts, or a special verdict, in order to determine whether the ruling on a demurrer to a pleading was prejudicial to the complaining party. *Gilliland v. Jones, Exr.*, 144 Ind. 662, 55 Am. St. 210; *McComas v. Haas*, 93 Ind. 276; *Evansville, etc., R. Co. v. Maddux*, 134 Ind. 571; *Olds v. Moderwell*, 87 Ind. 582; *Walling v. Burgess*, 122 Ind. 299, 7 L. R. A. 481.

It clearly appears from the facts found in the special verdict that appellant was not prejudiced by the overruling of the demurrer to her sixth paragraph

of answer, and it matters not whether the answer was or was not sufficient to withstand the demurrer.

The only remaining question for us to determine is whether the special verdict finds facts sufficient to support a judgment in favor of appellee upon the issues joined. The relevant and material facts in the verdict, briefly stated in narrative form, are as follows: That on September 8, 1876, Benjamin E. Robinson owned the real estate described in the complaint; that a judgment was rendered against him in the Gibson Circuit Court on said day; that Lydia E. Robinson was then his wife and so remained to the time of his death; that on May 26, 1876, an execution was issued on said judgment, and under said execution said real estate was sold by the sheriff to George B. Arnold, November 18, 1876, and a deed of conveyance made to him thereunder, December 1, 1877; that Lydia E. Robinson was not a party to said judgment; that she never executed any deed to said real estate; that said Arnold conveyed said real estate to appellant September 24, 1892; that on February 2, 1894, appellant and her husband executed the deed to the wife of appellee, described in the complaint; that the consideration for said conveyance was \$275.00, which was paid by appellee; that on May 26, 1894, appellee's wife and appellee conveyed said real estate to Mary E. Chapman; that the consideration for said conveyance was an agreement of said Chapman to immediately convey the same to appellee, which she did; that on February 2, 1894, appellee and his wife went into possession of said real estate and have remained in possession thereof ever since; that Benjamin E. Robinson died about fifteen years ago and Lydia E. Robinson, his wife, about three years ago; that Permelia Steele, Malinda J. Eskew, George W. Robinson, James M. Robinson and Mattie Fortner were the only children

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of said Lydia E. that survived her; that Luther Blythe, Mattie Barbee, and Ella Blythe were grand children of said Lydia E.; that on May 28, 1895, all the heirs of said Lydia E., except James Robinson, conveyed by warranty deed all their interest in said real estate to appellee; that immediately after the death of said Lydia E., Alonzo Steele, as agent for all of said heirs, asserted to appellee that said heirs were the owners of an undivided one-third interest in said real estate; that as such agent, he threatened to sue appellee for the interest of said heirs in and to the same; that appellee acted in good faith in making such purchase from said heirs; that he paid therefor \$65.00; that said Steele, as such agent, demanded of appellee that he should purchase the interest of said heirs, and threatened to institute suit at once if appellee refused so to purchase; that said Arnold went into possession of said real estate September 1, 1877, and remained in possession thereof till September 24, 1892; that appellant then went into possession and so remained till February 2, 1894; that appellee paid and agreed to pay the entire consideration for said conveyance by appellant to appellee's wife; that appellee did not pay any money consideration for the conveyance to him; that the heirs of said Lydia E. Robinson did not make any demand or claim upon appellee, except through said Alonzo Steele, and that said Steele told appellee that said heirs owned an undivided one-third of said real estate and if he did not pay them they would bring suit.

Appellant insists that before appellee was entitled to recover it must appear that he suffered an eviction, and that the special verdict does not show such fact. True, there was no actual eviction, but a recovery may be had for a breach of warranty without actual eviction. The covenant of warranty is an assurance by the

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grantor of the estate that the grantee shall enjoy the same without interruption by virtue of a paramount title. *Rindskopf v. Farmers' Loan & Trust Co.*, 58 Barb. (N. Y.) 36; *Moore v. Lanham*, 3 Hill (S. C.), 304. To constitute a breach of warranty and entitle the grantee to an action on the covenant, the eviction must be by paramount title. *Fowler v. Poling*, 6 Barb. (N. Y.) 165. And there must be an actual or constructive eviction of the whole or a part of the premises. *Beebe v. Swartwout*, 8 Ill. 179; *Bostwick v. Williams*, 36 Ill. 65, 85 Am. Dec. 385; *Funk v. Creswell*, 5 Ia. 88; *Mott v. Palmer*, 1 N. Y. 564; *West v. Stewart*, 7 Pa. St. 122.

Appellant admits that if the holders of the paramount title to the undivided one-third of the real estate, demanded their interest in such a way and under such conditions that the appellee was compelled to yield and purchase the outstanding paramount title to avoid an ouster, then such facts would constitute a constructive eviction, and would be sufficient. It seems clear to us that the special verdict abundantly shows such facts. It is shown that the heirs of Lydia E. Robinson were the owners in fee of an interest in said real estate; that they asserted their claim; that they demanded of appellant to purchase of them their interest therein; that they threatened him and informed him that if he did not so purchase, they would bring suit against him for such interest, etc.; that to protect his title and save an actual eviction, he did make such purchase, and did it in good faith. On principle, and under the authorities, such facts constituted a constructive eviction.

There is no merit in appellant's insistence that the verdict fails to show that Alonzo N. Steele was the agent of the Robinson heirs, and was authorized to act for them. The verdict does find that he was

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their agent; that he did assert their title; that he demanded of appellee to purchase their interest, and informed him that if he refused, they would bring an action to enforce their rights. In such case it was not necessary for the jury to find the evidentiary facts by which said Steele was constituted such agent. It was sufficient for the jury to find the ultimate fact, and this they did. The fact of the agency having been established, the acts of the agent, within the scope of his authority, were the acts of his principals, and as he made the necessary demands upon appellee to constitute constructive eviction, it was all that was necessary.

Taking and construing the verdict as a whole, it shows a clear right in appellant to recover on the warranty, and the court properly pronounced judgment in his favor on the special verdict. The case appears to have been tried on its merits and a correct conclusion reached. There is no reversible error in the record. Judgment affirmed.

TEBBS v. THE CLEVELAND, CINCINNATI, CHICAGO AND
ST. LOUIS RAILWAY COMPANY ET AL.

[No. 2,464. Filed May 19, 1898.]

CARRIERS.—Railroads.—Violation of Bill of Lading.—Damages.—Parties.—Where a consignor shipped a car load of merchandise with bill of lading containing the clause "with privilege of stopping over at Greensburg and Rushville, Ind.," the consignee thereof may maintain an action against the carrier for failure to stop at such points. *pp. 193-199.*

SAME.—Rights of Consignee to Goods in Transit.—The consignee of merchandise has the right to control it in transit. *p. 199.*

SAME.—Damages for Breach of Condition in Bill of Lading.—A complaint in an action against a railroad company for a breach of a condition in a bill of lading permitting a car load of bananas to be stopped at intermediate towns in transit, which alleges that plaintiff intended selling the bananas at the towns named in the permit; that they had a market value at such towns; that the bananas were

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shipped to meet the demands of the market at such towns, but by being taken further became unfit for use and valueless, and that by reason of such breach on the part of defendant, plaintiff lost the value which he would have received if the contract had been performed, states a good cause of action for damages. *pp. 193-200.*

From the Dearborn Circuit Court. *Reversed.*

G. M. Roberts and *C. W. Stapp*, for appellant.

Byron K. Elliott and *William F. Elliott*, for appellees.

COMSTOCK, J.—The complaint alleges that a bill of lading was issued by the C., C., C. & St. L. Ry Co. to J. Leverone & Co. for one car load of bananas, and that the car was consigned to appellant under the name of Tebbs Bros., at Anderson, Indiana. The bill of lading contains the following clause, "with privilege of stopping over at Greensburg and Rushville, Ind." The breach of the contract upon which the complaint counts is that the appellee refused to stop the car either at Greensburg or Rushville. The court below sustained a demurrer to the complaint for want of facts to constitute a cause of action. This ruling of the court is the error assigned upon appeal.

Omitting formal portions of the complaint, it is as follows: That on and prior to August 29, 1894, plaintiff was engaged in doing business under the firm name of Tebbs Bros., and selling bananas in the markets to merchants and grocers along the line of defendant's railway in the cities of Greensburg, Rushville and Anderson; and prior to said 29th day of August, 1894, had arranged to sell in the markets in each of said cities in Indiana, and had arranged to procure from the city of Cincinnati, Ohio, a car load of bananas, and ship the same through said cities of Greensburg, Rushville and Anderson, with the privilege of stopping over at each of said places and sell to

customers in such markets, and that on or about said 29th day of August, 1894, he purchased of defendants, J. Leverone & Company, of Cincinnati, Ohio, a car load of bananas for the purpose of making such shipment, which car load of bananas was of the value of \$350.00, and of good merchantable and marketable condition and quality, and caused said J. Leverone & Company on said day to ship said car load of bananas so purchased from them, over the defendant's railway, with the privilege of stopping over at said cities of Greensburg and Rushville, to be consigned to plaintiff at said city of Anderson, and said J. Leverone & Co. on said 29th day of August, 1894, for the use and benefit of this plaintiff, shipped said car load of bananas over defendant's railway, and said defendant then entered into a written and printed contract with said J. Leverone & Co. for the use and benefit of this plaintiff, for the shipment of said car load of bananas, a copy of which printed and written contract is made a part of this complaint, filed herewith and marked "exhibit A;" that although said contract was issued in the name of said J. Leverone & Co., the same was issued for the use and benefit of plaintiff, and said defendants, J. Leverone & Co., have no right, title or interest therein, and they are made parties defendants to answer as to any such right, title or interest, if any they claim; that defendant took possession of said car load of bananas and undertook to ship the same as provided, and did carry the same through said Greensburg and Rushville, and this plaintiff, before or while said car load of bananas was at Greensburg, Indiana, and immediately before its arrival there, notified and demanded the defendant to stop and side track said car load of bananas at said city of Greensburg, and said defendant, without plaintiff's consent, and against his will, failed and refused to allow said car load of ba-

nanas to be stopped or side tracked at the said city of Greensburg, and caused the same to be carried on to the said city of Anderson, without any stop over, and without allowing plaintiff to take bananas therefrom; that before or at the time said car load of bananas reached said city of Rushville, plaintiff notified and demanded appellant to stop and side track said car load of bananas at said city of Rushville, and that said defendant, without plaintiff's consent, and against his will, failed and refused to allow said car load of bananas to be stopped or side tracked at said last mentioned place, without allowing plaintiff to take bananas therefrom, and carried them on through to the place of their final consignment, and there delivered them to this plaintiff; that the stop over privilege expressed in said contract was by the parties and custom of common carriers agreed and understood to be for the purpose of allowing a portion of the contents of said cars to be unloaded; that said contract for shipment was entered into for a valuable consideration moving to the said defendant; that this plaintiff and the said firm of J. Leverone & Co. in whose name said contract was made for this plaintiff, have each performed the stipulations and conditions of said contract on their parts required to be performed; that the defendant has violated and broken said contract in failing and refusing to stop over and side track said car load of bananas at said cities of Greensburg and Rushville; that at the time said car load of bananas was shipped from said city of Cincinnati, there were therein 700 bunches, in sound condition, not decayed, of good merchantable quality, and then and at the time the said car arrived at said city of Greensburg, were of the value of fifty cents per bunch, that being the market value per bunch at said city of Greensburg of the kind of bananas that were in said car when it

arrived at said city of Greensburg; that said city of Greensburg is a city having 4,000 inhabitants, and at said time the banana market of said city was poorly supplied, and there was a great demand for bananas at said market price, and had said car been stopped at that place plaintiff could and would have sold in the market at that place more than 250 bunches of said bananas at and for the price of fifty cents per bunch, and could and would have sold the ripest portion of said car load of bananas which were then in good marketable condition; that said city of Rushville was then a city of more than 5,000 inhabitants, and at the time said car arrived at said city there was a good market and a great demand for bananas at said city, and the market price there for bananas, such as were more than one-third of the said car load when it arrived there, was sixty cents per bunch, and had said car been stopped over at said city of Rushville, plaintiff could and would have sold in the market of said city more than 200 bunches of bananas from said car load at the price of sixty cents per bunch, which was then the market price at said city of said bananas and the value thereof, and the plaintiff could and would have sold the ripest portion then remaining in said car, and which portion was at least one-third of the whole amount in said car, and which portion was then of good merchantable quality; that when said car arrived at said city of Anderson, and continuously thereafter, there was a poor market at that point for said bananas; that the market at said point had been supplied; that he was unable to sell any of said bananas there, without great sacrifice and was wholly unable to dispose of but a small portion of said car load; that the nature of the banana trade and the character of bananas is such that it is a fact that unless bananas when ready

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for the market are speedily sold they will in a very short time decay and become unfit for use; that while more than 250 bunches of said bananas in said car were of good merchantable quality when the same arrived at the said city of Greensburg, and while said number of bunches from said car could and would have been sold in the market there at the price aforesaid, and were upon their arrival of good merchantable quality and of the value of \$150.00, yet the plaintiff says that by reason of said car not being stopped at said point and because of the delay from the time it arrived at said city of Greensburg until it arrived at said city of Anderson, said portion that could and would have been sold at said city of Greensburg became spoiled, decayed and unfit for use, and wholly valueless, and there was no market therefor in said city of Anderson; that while more than 200 bunches of said bananas in said car were of good merchantable quality when the same arrived at said city of Rushville, and while said number of bunches from said car could and would have been sold in the market there at the market price aforesaid, and were upon their arrival there of good merchantable quality and of the value of \$150.00, yet the plaintiff says that by reason of said car not being stopped at said point and because of the delay from the time it arrived at said city of Rushville until it arrived at said city of Anderson said portion that could and would have been sold at said city of Rushville became spoiled, decayed and unfit for use and wholly valueless, and there was no market therefor in said city of Anderson; that when said car load of bananas arrived at said city of Greensburg 250 bunches thereof were of the value of \$125.00, and by reason of said car not being stopped over at said city, when the car arrived at said city of Anderson said bunches were wholly valueless. That when

said car arrived at said city of Rushville 200 bunches thereof were of the value of \$120.00, and by reason of said car not being stopped over at said city of Rushville when said car arrived at said city of Anderson said bunches were wholly valueless; that when said car load of bananas reached said city of Anderson, the whole thereof was of the value not to exceed \$10.00; that by reason of the violation of said contract plaintiff has been damaged in the sum of \$300.00.

The learned counsel for appellee contend that the trial court committed no error, for the following reasons:

(1) "The contract did not give the appellant the privilege of stopping the car at Greensburg or Rushville, but, on the contrary, conferred that privilege upon Leverone & Co., and Leverone & Co. were the only parties who could exercise the privilege, so that a request to stop from any one else was ineffective. (2) The contract embodied in the bill of lading confers a privilege, and in order to make the carrier liable for a denial of the privilege, it was necessary to aver and prove that there was a reasonable request to stop, and that it was preferred by the proper parties to the proper agents or employes of the carrier. (3) There are no facts pleaded from which it can be adjudged, as matter of law, that there was a duty to stop the car either at Greensburg or Rushville. (4) There are no facts averred from which it can be adjudged, as matter of law, that there was a reasonable request to stop at either of the places embraced in the clause of the bill of lading granting the privilege of stopping the car before it reached its destination. (5) There are no facts pleaded giving the plaintiff any right to damages demanded, for the damages demanded are purely speculative and conjectural.

As to the first reason. The goods were received by

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the carrier at Cincinnati, Ohio. Appellant was the purchaser and was at the time of shipment the owner. The contract was made for the benefit of appellant. Appellant was the consignee as Tebbs Brothers, and had the right to control them in transit. The consignee is the presumptive owner of the thing consigned. When the carrier is not advised that any different relation exists, he is bound so to treat the consignee. *Sweet v. Barney*, 23 N. Y. 335; *London, etc., R. W. Co. v. Bartlett*, 7 H. & N. 400; *Madison, etc., R. R. Co. v. Whitesel*, 11 Ind. 55; *Pennsylvania Co. v. Holderman*, 69 Ind. 18; 5 Am. and Eng. Ency. of Law (2nd ed.) p. 215. The complaint avers that the appellee was the owner at the time of the shipment and the presumption would be that the stop over privilege was for his benefit.

The second, third, and fourth reasons go to the reasonableness of the request to stop. Counsel insist that it was not made in time; was not sufficiently definite, and that it required appellee to side track the car. This court cannot say that it was not made in time, nor that it was not sufficiently definite, nor that a request to side track the car was unreasonable. No limitation was made in the contract as to the time for which the car should be stopped, and defendant refused to make any stop. If the request was not timely, it would be a proper matter of defense.

If, as stated in the fifth reason, the damages claimed were purely speculative and conjectural, the demurrer was properly sustained. The complaint alleges that there was a good market for the bananas at both of the places named; that they had a market value which is stated; that the bananas were shipped to meet the demands of the market at these places, but by being taken further became unfit for use and valueless; that by reason of the breach of the contract in question

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appellant lost the value which he would have received if the contract had been performed. The law presumes that the market value of a commodity can be obtained; a market price is not speculative nor conjectural.

We are of the opinion that the complaint states a good cause of action. It avers the making of a contract for a valuable consideration; that appellee refused to perform its part of the contract; that it was fully performed on the part of the consignor and consignee, and that by reason of the breach appellant suffered damage. The judgment is reversed, with instructions to the court below to overrule the demurrer to the complaint.

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[No. 2,520. Opinion on motion to advance cause filed Nov. 5, 1897.
Principal opinion filed May 19, 1898.]

APPEAL AND ERROR.—*Advancement of Cause.*—A motion to advance a cause must show by affidavit the grounds upon which the motion is based, and the facts must be so stated that the court can determine upon the face thereof, without reference to the record, whether the cause should be advanced. pp. 201-203.

PRACTICE.—*Carrying Demurrer to Answer Back to Cross-Complaint.*—*Harmless Error.*—Error cannot be predicated upon the action of the court in overruling a demurrer to a cross-complaint, where a demurrer was afterward sustained to an answer to such cross-complaint, and carried back and sustained to the cross-complaint. pp. 203, 204.

PLEADING.—*Theory.*—A pleading cannot perform the two-fold purpose of an answer in bar and also as asserting a cause of action. p. 204.

NEW TRIAL.—*Appeal and Error.*—*Record.*—A motion for a new trial must be sufficiently certain and specific to enable the court to identify the rulings without resort to any other part of the record. p. 205.

SUMMONS.—*Service by Copy at Place of Business.*—The service of a summons upon a defendant by leaving a copy at his last and usual place of business is not in compliance with the statute requiring a summons to be served either personally on the defendant or by

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leaving a copy thereof at his usual or last place of residence.
p. 205.

SUMMONS.—*Service by Copy at Place of Business.*—A judgment rendered upon service by copy at defendant's last and usual place of business is without jurisdiction of the person, and void, where defendant's residence and place of business were in the same city, about a mile apart, and he was absent from the city at the time the officer left the summons and made the return. p. 205.

From the Posey Circuit Court. *Motion to advance cause overruled. Cause affirmed.*

James W. Henson and E. C. Barrett, for appellant.

C. M. Spencer and G. V. Menzies, for appellee.

OPINION ON MOTION TO ADVANCE.

BLACK, J.—A motion has been made to advance this cause. Omitting its caption, it proceeds as follows: "Appellant and appellee respectfully petition this honorable court to advance this cause on the docket, and for an early decision of the same, for the following causes: First. The decision of this cause will determine other claims now pending, involving the same questions presented by the record. Second. The speedy determination of this cause will enable the administrator of the estate to make final settlement at an early date." This is signed by the attorneys of both parties, as such. The cause was submitted on the 16th of August, 1897, and a brief has been filed by each party. It having been determined upon consultation that this motion should be overruled, it was deemed proper that an interlocutory opinion be rendered showing the grounds of this determination, though it is the usual practice to pass upon such motions summarily and without the rendition of opinions thereon.

There is not, among the general rules of this court, any rule relating specifically to the advancement of the hearing of causes, but such a motion comes within

the rules of court pertaining to motions in general. The hearing of a cause may be advanced in a proper case upon proper application. The statute provides, that the clerk shall docket all appeals in the order in which the transcripts are filed; and they shall be heard in the same order, unless the court, for good cause shown, direct a different mode of hearing. Section 665, Burns' R. S. 1894 (653, Horner's R. S. 1897). We are relieved from deciding what power, if any, the court would have inherently in such a matter without such a statute, which, it has been said by the Supreme Court, invests the court with a discretionary power of changing the order of hearing causes. *Parker v. State, ex rel.*, 132 Ind. 419, 423. We will not now go into the question relating to what are good causes for which advancements of hearings may properly be made. The case above cited adverts to that matter, and the subject is discussed in the books of practice. See Busk. Prac. 331, *et seq.*; Elliott App. Proc., section 461, *et seq.* The application must be subsequent to submission, and it should be preceded or accompanied by the brief of the applicant upon the merits of the cause. In the case of a motion to advance, unlike that of an application for an oral argument, written notice must be given to the adverse party or his attorney, unless there be an express consent or a waiver of notice, or as in the case before us, a united application by both parties. Such a joining of the parties in a motion dispenses with the necessity for notice. But the advancement of a cause can never be claimed as of right. (*Parker v. State, ex rel., supra.*) It will not be allowed as a matter of course, even at the request of all the parties. Justice and fairness to other suitors whose suits would thereby be displaced and delayed forbid, and the statute does not allow, the granting of such an application, except upon a

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proper showing of good cause. Whatever may be the practice of the courts elsewhere, the appellate courts of this State, in determining whether or not good cause has been shown, will not, for such purpose, examine the contents of the transcript of the record on appeal. It may be readily understood that otherwise the time which must be given to the hearing and decision of causes would be improperly and unnecessarily diminished. In accordance with the practice in cases of motions in general, they must show the grounds upon which they are based, and matters of fact stated in them cannot be accepted as true upon the mere statement of the party or parties making the motion or their attorneys. The motion must be verified. The facts upon which the application is based should be fully stated, without aid through reference to the record of the cause; nothing should be left to mere inference or conjecture, but such a statement should be made that the court, upon the face thereof, can see a good cause for advancing the hearing, and the truth of the facts so stated should be established by affidavit.

It is readily seen that the motion before us does not properly show any supposed cause, good or otherwise, for advancement. Until that is done we need not decide further. The motion is overruled.

PRINCIPAL OPINION.

ROBINSON, C. J.—Appellant filed a claim against the estate of appellee's decedent.

The first error discussed is the overruling of appellant's demurrer to appellee's cross-complaint. Upon the overruling of this demurrer appellant answered the cross-complaint in two paragraphs, the first being the general denial. Appellee demurred to the second paragraph of answer, and this demurrer was carried

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back and sustained to the cross-complaint. As this ruling took the cross-complaint out of the record, it accomplished the same result as would have followed the sustaining of appellant's demurrer. We are not informed how appellant could have been harmed by the ruling complained of.

The claim was filed in four paragraphs. Appellee filed an answer addressed to the third paragraph, but it is evident from an examination of the pleadings, as stated in appellant's brief, "the answer was not only defective in its averments, but was wholly misdirected, thus amounting to no answer at all." But, even if it was a good answer to the paragraph to which it is addressed it purports to answer only one paragraph.

The statute gave appellee the right to make any defense except set-off or counterclaim without plea. Section 2479, Burns' R. S. 1894. Upon the sustaining of the demurrer to the cross-complaint appellant moved "for judgment in his favor on the pleadings herein on paragraphs one, two, three, and four of his original demand against said decedent's estate herein." This motion was overruled and this ruling is assigned as error.

The cross-complaint was in no sense an answer. It could not be both an answer and a cross-complaint. It must be the one or the other. The pleading was filed as a cross-complaint and was answered and treated as such by appellant. A pleading cannot perform the two-fold purpose of an answer in bar and also as asserting a cause of action. *Conger v. Miller*, 104 Ind. 594; *Campbell v. Routt, Admr.*, 42 Ind. 410. So that even if we should concede that one of the paragraphs was specially answered, there was no error in overruling the motion for judgment, for the general denial was in against the other paragraphs.

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Appellant, after the overruling of the above motion, dismissed the second and third paragraphs of claim and the cause was submitted for trial on the first and fourth paragraphs, resulting in a judgment in appellee's favor. A motion for a new trial must be sufficiently certain and specific to enable the court to identify the rulings without resort to any other part of the record. This court cannot look to the bill of exceptions to aid the motion, for the reason that the bill was not on file at the time the motion was presented to the trial court. It must appear that the ruling was fairly presented to the trial court for review before any question can be presented to the appellate tribunal. *Sim v. Hurst*, 44 Ind. 579; *Rogers v. Rogers*, 46 Ind. 1; *Shore v. Taylor*, 46 Ind. 345; *Noble v. Dickson*, 48 Ind. 171.

The service of a summons upon a defendant by leaving a copy thereof at his *last and usual place of business*, is not a compliance with the statute requiring a summons to be served either personally on the defendant or by leaving a copy thereof at his *usual or last place of residence*. A personal judgment upon default rendered upon such service, where it appears that the defendant's residence and place of business are in the same city, but about a mile apart, and that the defendant was absent from the city when the officer left the summons and made the return, is without jurisdiction of the person, and is void. *McCormack v. First Nat'l Bank*, 53 Ind. 466; *Jessup v. Jessup*, 7 Ind. App. 573; *Cavanaugh v. Smith*, 84 Ind. 380; *State, ex rel., v. Ennis*, 74 Ind. 17; *Pressley v. Harrison*, 102 Ind. 14; *Paulus v. Latta*, 93 Ind. 34.

It is argued that the decision of the court is not sustained by sufficient evidence. We have carefully examined the evidence and can but conclude that there is abundant evidence to sustain the trial court.

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We cannot disturb the finding upon the evidence. There was evidence to the effect that the claim was fully compromised and settled during the lifetime of the decedent. Although a smaller amount was accepted than the face of the claim, yet it is clear from the transaction, from the check given in payment and the receipt given, and that it was paid by a third person who accepted the creditor as his debtor, that the parties fully settled and canceled the claim. See *Wells v. Morrison*, 91 Ind. 51; *Fensler v. Prather*, 43 Ind. 119. Judgment affirmed.

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[No. 2,496. Filed May 20, 1898.]

PRACTICE.—Admission of Evidence.—Exception.—Appeal and Error.

—No error is committed in refusing an offer to prove a fact or facts where the offer embraces more and is of wider range than the question asked the witness. *pp. 210-212.*

SAME.—Evidence.—Life Insurance.—A question propounded to a witness in an action on a life insurance policy as to whether under the constitution a member had the right to change the beneficiary in his policy is properly rejected as the constitution itself is the best evidence of such fact. *pp. 213, 214.*

LIFE INSURANCE.—Declarations of Insured.—Statements or admissions made by insured are not admissible in evidence in an action on a policy of life insurance for the purpose of defeating the rights of the beneficiary. *p. 214.*

SAME.—Ownership of Policy.—Where an insurance policy is issued upon the life of one person for the benefit of another, and such beneficiary is named in the policy, it becomes the property of such beneficiary from the time it goes into force. *pp. 214, 215.*

SAME.—Warranties.—Warranties in an insurance policy are not favored in law. *p. 218.*

INSTRUCTIONS.—Life Insurance.—Warranties.—Guaranty.—An instruction to the jury in an action on a life insurance policy that "the word warranty means more than an agreement, it means a guaranty," is erroneous, as the words warranty and guaranty have different meanings. *pp. 217, 218.*

SAME.—Life Insurance.—Construction of Contract.—An instruction given to the jury in an action on a life insurance policy that "the

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word warranty means more than an agreement, it means a guaranty. Warranties are not favored in law and nothing can be construed as a warranty except that which was and is plainly and unequivocally declared to be such by the parties" is erroneous, as it gave the jury to understand that they had the right to construe the contract between the parties and determine whether the answers in the application amounted to warranties, where such answers were made warranties by the express terms of the contract. pp. 217-219.

INSTRUCTIONS. — *Life Insurance.* — *Contradictory Instructions.* — The court erred in charging the jury in effect in one instruction, in the trial of an action on a life insurance policy, that they might construe the contract between the parties and determine whether certain answers of the insured to questions in the application amounted to warranties, and in another instruction informing the jury that such answers were warranties, and if any answer was untrue the warranty was broken, and the policy void, as such instructions were contradictory. pp. 217-219.

SAME. — *Life Insurance.* — *Contradictory Instructions.* — An erroneous instruction is not cured by a correct instruction on the same matter which is contradictory of the erroneous one, it can only be cured by withdrawing it. pp. 219-220.

SAME. — *Life Insurance.* — *Contradictory Instructions.* — Where the court gives instructions which are contradictory and tend to mislead the jury, the judgment will be reversed. pp. 219, 220.

From the Johnson Circuit Court. *Reversed.*

Marshall Hacker, Charles F. Remy and Clifford, Browder & Moffett, for appellant.

James F. Cox and M. L. Herbert, for appellee.

WILEY, J.—Appellee, as beneficiary of Henry Brockman, deceased, sued appellant upon a life insurance policy issued by appellant on the life of said Brockman. The complaint was in three paragraphs, but as a demurrer was sustained to the first, no further notice need be taken of it. In the second paragraph it is averred that appellant, on the 19th day of March, 1892, issued a policy of insurance upon the life of Henry Brockman, in the sum of \$1,000.00, for and in consideration of a certain initiation fee and premium, which were paid; that by the terms of the policy monthly payments, etc., were to be made, on or

before the 20th day of each month, to the agent of appellant, in the city of Columbus, Indiana; that, in pursuance to said provision of the policy, said Henry Brockman paid all said monthly installments as they became due, up to the 20th day of June, 1894, and on said day, and when said monthly installment became due, he tendered to appellant, through its authorized agent, the sum of \$2.15, in legal tender money of the United States, which was the amount of said monthly premium, but which appellant refused to accept for the reason then claimed by appellant, that said Henry Brockman forfeited his policy by reason of drinking intoxicating liquors, and that appellant then and there declared, through its agent, that it would not accept any more dues or installments of premiums from said Brockman; that said Brockman was at all times ready and willing and able to pay all premiums, etc., as appellant well knew, and that he performed all the conditions of said policy on his part; that said Brockman died on the 6th day of August, 1895; that when said policy was issued and all the time up to his death, appellee was his wife; that on April 18, 1895, she furnished appellant with proof of loss of the death of said Brockman, and performed all of the conditions of said policy on her part; that appellant has not paid said sum, and that it is due, etc. A copy of the policy is filed as an exhibit to the complaint.

The third paragraph of complaint is in all essential respects like the second, differing from it only in some immaterial averments as to the agents of appellant, and the payment to them of dues, etc. A demurrer to each of these paragraphs of the complaint was overruled and such ruling is assigned as error. Counsel, however, have failed to discuss their sufficiency, and hence the question is waived.

Appellant answered in three paragraphs, but no

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question is presented as to the sufficiency of the answer, and it is unnecessary to state, even briefly, its contents. There was a trial by jury, and a general verdict for appellee. Appellant's motion for a new trial was overruled, and judgment rendered on the verdict.

The overruling of the motion for a new trial is the only alleged error discussed. Appellee insists that the bill of exceptions was not filed in time, and hence the evidence, instructions, etc., are not in the record; but this insistence is not tenable.

Before taking up the questions presented by counsel, we deem it proper to say that appellant's defense rested upon an alleged violation of the terms of the policy and application, which was made a part of the policy; and the second paragraph of answer averred that in said application, said Brockman stated and warranted that he was a total abstainer from the use of intoxicating liquors, and that he did not then, nor would he in the future, "practice any pernicious habit that obviously tended to shorten life," and that after the policy of insurance was issued, and for several months prior to his death, said Brockman drank intoxicating liquors to excess, which was a "pernicious habit and obviously tended to shorten his life," whereby said policy was forfeited. It was upon this line that the defense was made, and appellant earnestly contends that the facts disclosed by the record, based upon its answer, will preclude a recovery. Upon this question, however, we cannot disturb the judgment, for the reason that the evidence is conflicting, and the jury having passed upon it, puts it to rest.

In his application for insurance, the decedent Brockman, stated in answer to certain questions, that he had had delirium tremens, and that he had been

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insane. He also stated that at the time of his application he did not use intoxicating liquors. It is an undisputed fact as it appears from the record, that Brockman, prior to the issuing of the policy sued on, was an habitual drinker of intoxicating liquors, had had the delirium tremens, and had been in the hospital for the insane. It is the theory of the appellee, and the evidence seems to sustain it, that after the policy was issued, the insured had the *la grippe*, and the contention of appellee is that the disease left him greatly impaired in health, and to such an extent that at times when he was walking he became dizzy, which made him walk and stagger as a drunk man. On the other hand, the theory of the appellant is that his staggering and dizziness was caused by intoxication. It is upon these two theories that the sharp contention arises, and with this in view, we proceed to a consideration of such questions as are raised by the motion for a new trial and discussed by counsel.

The seventeenth reason assigned for a new trial was sustaining appellee's objection to the following question propounded to Ed. King, a witness for appellant: Q. "State to the jury whether you observed Mr. Brockman's habits and conduct previous to the time he went to the asylum, whether or not he was boisterous?" Upon the court's refusal to permit the witness to answer this question, appellant stated in writing what it offered to prove as follows: "The defendant offers to prove by this witness in answer to this question and others, that he had an acquaintance with Henry Brockman and had seen him both when drunk and sober for a long period of time, and was acquainted with the peculiarities and ordinary actions of said Henry Brockman when drunk; and offers further to prove that said Henry Brockman when drunk never was at any time noisy or boisterous, and that his con-

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duct at the times when he saw him drunk since March 19, 1892, was the same as when he saw him drunk before that time." And the record shows that upon objection of appellee the court refused to entertain such evidence or let the same be proved to the jury. On cross-examination of some of appellant's witnesses, appellee sought to elicit the fact that Brockman was at no time noisy or boisterous, and that his actions and conduct were those of a sick and feeble man, rather than of one who was drunk. The evidence which was offered to contradict this fact, so far as possible, was by showing that before he was in the asylum, and when it is admitted that he was drinking to excess, he was not noisy and boisterous, and that his conduct then, when intoxicated, corresponded to his conduct after the issuing of the policy, when it was claimed by appellant that his conduct was the result of drunkenness and not sickness, etc.

We are not prepared to say whether or not the court erred in excluding the offered evidence, but it seems clear to us that what appellant offered to prove by the answer to the question to which an objection was sustained, was not responsive. The offer to prove was so much broader than the question, and included so many elements not embraced by the question, that there was no available error in excluding it. An offer to prove a fact or facts by "other questions" which "other questions" are never asked, is not reviewable in an appellate tribunal. The question asked the witness might have been properly answered, for it asked the witness to state a distinct fact, but where error is predicated upon the exclusion of evidence, the only way to present it is to ask the question, and then it is for the court to determine its competency. When a litigant offers to prove a fact or facts in answer to a question asked of a witness, and "other questions,"

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which are never asked, there is no error in refusing the offer, if the offer embraces more and is of wider range than the question asked. Neither the trial court nor appellate court can know whether a question in the mind of an attorney is competent or incompetent, when such a question is not made known to the court. To save the point on appeal, the question must be asked the witness, and the proper exception reserved. *Gipe v. Cummins*, 116 Ind. 511. See, also, *City of Terre Haute v. Hudnut*, 112 Ind. 542; *Binford v. Young*, 115 Ind. 174.

The only responsive and legitimate answer that could have been made by the witness King, to the question asked him, was that he did or did not observe Brockman's habits prior to the time he went to the asylum, and that he was or was not boisterous or noisy. While it might have been competent for the witness to answer this question, the error in excluding it, if it was error, was not in our judgment, harmful, for, looking at the whole record, it could not possibly have changed the result. A judgment will not be reversed for a harmless error. *Rhinehart v. Niles*, 3 Ind. App. 553; *Passmore v. Passmore*, 113 Ind. 237; *Whitworth v. Ballard*, 56 Ind. 279.

The fourteenth reason assigned for a new trial was the refusal of the court, over appellee's objection, to permit J. F. Pancake to answer the following question: Q. "You may state if you ever had any conversation with Henry Brockman in reference to his drinking?" On the court's refusal to permit the witness to answer this question, the appellant offered to prove in answer to it, that Henry Brockman after the 19th day of March, 1892, frequently talked to witness about his habit of drinking intoxicants. Even if appellant had been permitted to prove what its offer shows, it could not have availed it anything, for the offer does not go

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to the extent of showing what Brockman said, and as to what he said would not be competent, as we will discuss later.

The fifteenth reason assigned for a new trial was in refusing to permit the witness J. S. Anderson to answer the following question: "You may state to the jury whether or not in the constitution, a member may have the right to change the beneficiary?" In answer to this question appellant made in writing the following offer: "The defendant offers to prove by the witness J. S. Anderson that under the constitution of the defendant, The Masons' Union Life Association, the insured has the right to change the beneficiary in the policy." "And the defendant further offers to prove by the witness J. S. Anderson, that in the latter part of April, 1894, he visited the insured, and had a conversation with him and that he called the attention of the insured to the fact that he was drinking intoxicating liquors to excess and informed him that unless he quit that the policy would be forfeited, and the assured said that he would quit drinking intoxicating liquors to excess." The court did not err in refusing to permit the witness Anderson to answer the question, which forms the basis for the fourteenth reason for a new trial. The question and offer to prove would not have shed any light upon the question at issue. The fact which appellant offered to prove in answer to the question was that the insured, after the issuing of the policy frequently talked to the witness about his habit of drinking intoxicants. It will be observed that this offer does not seek to show what the insured said about his habit of drinking intoxicants, but only that he talked about it. Conceding, without deciding that appellant had the right to prove what the insured said as to his habit of drinking intoxicating liquors to excess, after the issuing of the

policy, yet the mere fact that he talked about it, without showing what he said, would not prove a fact. The appellant's offer to prove by J. S. Anderson that under its constitution, a policy holder had the right to change the beneficiary named therein was properly refused. If such proof was competent, it was the duty of appellant to offer the best evidence of it, which was the constitution itself. But in this case, we cannot see what benefit would have accrued to appellant if it had been permitted to prove that fact. The appellee was the original beneficiary named in the policy, and she remained such, and it follows that though the insured might have had the right to make a change, as he did not do so, the appellant was not harmed in the court's refusal to let it make the proof offered.

There are two reasons why the latter part of the offer to prove, in answer to the question we are now considering, was properly refused: (1) The question does not embrace what the offer seeks to prove. Where testimony is excluded, the error, if any, can only be made available by asking a pertinent question of a witness, and if objection is made, stating to the court what testimony or evidence the witness will give in answer to the question proposed, and if an objection is made and sustained, an exception must be reserved. *Gipe v. Cummins, supra*. We discussed this principle under the seventeenth reason for a new trial, and need not advert to it further. (2) In cases of this character it is not competent for the purpose of defeating the rights of the beneficiary, to prove the declarations of the insured, which declarations would tend to prejudice such rights. The rule seems firmly established that where an insurance policy is issued upon the life of one person for the benefit of another, and such beneficiary is named in the policy, it becomes

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the property of such beneficiary from the date it goes into force. *Presbyterian Mutual Assurance Fund v. Allen*, 106 Ind. 593; *Wilburn v. Wilburn*, 83 Ind. 55; *Penn Mutual Life Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769; *Holland v. Taylor*, 111 Ind. 121.

In *Damron v. Penn Mutual Life Insurance Co.*, 98 Ind. 478, the Supreme Court said: "An insurance policy, issued upon the life of a husband for the benefit of his wife, is her property, and an effectual assignment and delivery thereof to another, even during the lifetime of the husband, can be made only by her."

In *Kline v. National Benefit Association*, 111 Ind. 462, 60 Am. Rep. 703, it was said: "The beneficiary took an immediate interest in the policy, and her rights could not be impaired by any act of the assured performed subsequent to the execution of the policy, for the contract is that of an ordinary insurance company, and not that of a benevolent organization."

It is next contended that the court erred in excluding certain evidence, offered by appellant, of the witness J. M. Taylor. Taylor was the agent of appellant and who wrote and took the application of Brockman for the policy issued on his life. The question asked of him, and to which the court sustained an objection, was as follows: "State to the jury, Mr. Taylor, what, if any, explanation you made to Mr. Brockman at the time the application was written, in reference to the meaning of the expression 'that I do not now and will not practice any pernicious habit that obviously tends to shorten life?'" In response to this question, appellant offered to prove "that at the time the application was written that it was fully explained to Henry Brockman that the clause in the application, 'that he does not now and will not practice any pernicious habit that obviously tends to shorten life,' included the drinking of intoxicating liquors, and that Henry

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Brockman at the time understood that if he practiced the habit of drinking intoxicating liquors that the policy of insurance, based upon the agreements and answers in the application, would be null and void, and that said Henry Brockman agreed to the same."

Appellant insists that this evidence was admissible, on the theory that the words used in the application were not clear in themselves, and that the court will avail itself of the meaning and interpretation placed upon them by the parties. We cannot agree with this insistence. The application as made was written, and it was the contract between the parties. It is not shown that the words used in the application were not fully understood by the insured, and, in view of the fact that they were not uncertain, obscure or ambiguous, we may correctly presume that the insured fully understood them. Again, all that was said between Taylor and Brockman prior to that time, and up to the time the application was made, was merged in the writing, and the writing speaks for itself.

As appellant's defense was grounded upon the alleged facts that Brockman used intoxicating liquors to excess, which impaired his health, and was a pernicious habit which obviously tended to shorten life, it was bound to prove such fact; but it was not competent to prove it by conversations that took place between Taylor and the insured prior to the application, and that Brockman understood what the language meant.

It is a part of the common knowledge and observation of human life, that the excessive use of intoxicating liquors tends to shorten life, and each man and woman who has arrived at an age of understanding knows that such excessive use of intoxicants is a pernicious habit. There being nothing ambiguous,

uncertain or obscure in the application, parol evidence as to what was said about it was not admissible. It was said in *Chaplin v. Baker*, 124 Ind. 385, that "it is as well settled by the decisions of this court as a question can be settled, that when parties have finally reduced their contract to writing, all previous negotiations resting in parol are merged into the written contract, and that it alone must be looked to to ascertain the legal rights of the parties." See 11 Am. and Eng. Ency. of Law, p. 300.

Counsel for appellant next discuss the giving and refusing to give certain instructions, and giving, as modified, certain instructions tendered by appellant. Instruction number four, tendered by appellee, and given by the court, was as follows: "The word warranty means more than an agreement; it means a guaranty. Warranties are not favored in law and nothing can be construed as a warranty except that which was and is plainly and unequivocally declared to be such by the parties." The first and second instructions tendered by appellant and given by the court are as follows:

(1) "By the terms of the policy in this case the application therein mentioned is made a part of it; the answers in the application are warranties, and if any answer is untrue the warranty is broken and the policy void." (2) "The agreement of the parties that the statements in the application are true, and their falsity in any respect should avoid the policy, removes the questions of their materiality from the consideration of the court or jury or either of them."

It is the contention of appellant that these instructions could not be considered or construed together by the jury without leaving them in doubt as to the most important point in the case. It is earnestly insisted by the learned counsel for appellant, that in-

struction number four above is erroneous, because it gives the jury to understand that they had the right to construe the contract between the parties; because it told the jury that a warranty means a guaranty, and because it told the jury that warranties are not favored in law. As to the latter objection it is not well taken. It is well settled that by reason of the stringent character of warranties in insurance policies, they are not favored in law. *Union Central Life Ins. Co. v. Pauly*, 8 Ind. App. 85; *Supreme Lodge v. Hutchinson*, 6 Ind. App. 399; *Northwestern, etc., Life Ins. Co. v. Hazelett*, 105 Ind. 212; *Rogers v. Phenix Ins. Co.*, 121 Ind. 570; *Penn Mutual Life Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769; *Havens v. Home Ins. Co.*, 111 Ind. 90, 60 Am. Rep. 689.

It seems to us that the instruction is, however, erroneous in two essentials: (1) In telling the jury that a warranty means more than an agreement, it means a guaranty. In legal contemplation, there is a wide difference between warranty and guaranty, and in the sense in which they are used in the instruction they are not synonymous terms. In the case before us the answers in the application, etc., are made warranties by express terms. They constitute the contract between the parties. In law, the term warranty is an engagement or understanding forming a part of a transaction. It is an absolute understanding or liability on the part of the warrantor, and a contract of warranty is void unless it is strictly and literally performed. See *Rapalje & L. Law Dict.* p. 1346. Also *White v. Life Ins. Co.*, 4 Dill. 177, 181; *Jeffries v. Life Ins. Co.*, 22 Wall. 47; *Ins. Co. v. Pyle*, 44 Ohio St. 19, 29, 58 Am. Rep. 781, 4 N. E. 465. A guaranty is a collateral promise to answer for the debt, default or miscarriage of another, and is distinguishable from an original and direct contract for the promisor's own

act. Chitty on Contracts, p. 582. (2) It leaves the contract to the construction of the jury. The contract was in writing, plain and unequivocal, and it was the duty of the court to construe it and instruct them just what it meant. It was not proper for the court to say that nothing can be construed as a warranty except that which was and is plainly declared to be such by the parties, for it left the jury to infer that they might construe the contract to constitute a warranty, or otherwise at their pleasure. And it is subject to the further objection that it was for the jury to determine whether or not the parties had "unequivocally declared" such contract to be a warranty. Courts can only put a certain construction upon a contract where such contract is vague, indefinite and uncertain, where it appears that the parties to the contract have so construed it themselves. We have already discussed this question and clearly demonstrated that as there is no ambiguity, etc., in the contract, its construction was for the court.

Instructions 1 and 2 tendered by appellant and given by the court, correctly state the law, and put a construction upon the contract. We are unable to understand how the jury could construe these three instructions together without being in doubt as to what the law was on an important question in the case. The rule is well established in this State that an erroneous instruction is not cured by a correct instruction on the same matter, which is contradictory of a former instruction. *Union Central Life Ins. Co. v. Hollowell, Admr.*, 14 Ind. App. 611; *Summerlot v. Hamilton*, 121 Ind. 87; *McCrary v. Anderson*, 103 Ind. 12; *McCole v. Loehr*, 79 Ind. 430.

When instructions are contradictory and tend to mislead the jury the judgment will be reversed. *State, ex rel., v. Sutton*, 99 Ind. 300. Where a fatally erro-

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neous instruction has been given, it can only be cured by a plain withdrawal of it. *Lower v. Franks*, 115 Ind. 334. See, also, *Pittsburgh, etc., R. W. Co. v. Noftsgen*, 148 Ind. 101, where the authorities are reviewed, and Monks, J., said: "Besides, if two or more instructions are inconsistent and calculated to mislead the jury, or leave them in doubt as to the law, it is cause for reversal." *Wenning v. Teeple*, 144 Ind. 189. For the error in giving instruction number four tendered by appellee, the judgment must be reversed. Judgment reversed, with instructions to the court below to sustain appellant's motion for a new trial.

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[No. 2,518. Filed May 20, 1898.]

BILLS AND NOTES.—*Principal and Surety.*—*Release of Surety by Extension of Time.*—In order to release the surety on a promissory note by reason of the extension of the time of the payment of the note, it is necessary that the extension should be for a definite period, that it should be for a valuable consideration; that it should be done without the consent of the surety and that the holder of the note should have knowledge of the fact that the person seeking the relief for such cause is surety. p. 221.

INSTRUCTIONS.—*Incomplete Instruction.*—An instruction which undertakes to set out the material facts necessary to be proved in order to maintain an action or defense must be correct and complete. pp. 221-224.

From the Montgomery Circuit Court. *Reversed.*

M. W. Bruner and Crane & Anderson, for appellant.
Paul & Van Cleave, for appellees.

HENLEY, J.—Appellant began this action in the lower court against the appellees upon a promissory note. Appellee Shotts filed his separate answer in two paragraphs. There was a judgment by default against appellee Petro, who was the principal maker of the note. The defense made by the answer of appellee Shotts is that he is the surety on the note sued

on; that appellant, the payee, and John E. Petro, the principal maker of the note, entered into an agreement for a valuable consideration, to extend the time for payment of the note for a definite period without the knowledge or consent of said appellee; and that appellant knew when such agreement was made that said appellee was a surety on the note. There was a trial by jury, which resulted in a verdict in favor of appellee Shotts, and a judgment in favor of said Shotts for his costs. Appellant filed a motion for a new trial, which was overruled.

The ruling of the lower court on the motion for a new trial is the only error assigned. The only question presented by the motion for a new trial and argued by counsel for appellant arises upon the instructions given by the court to the jury. It is contended that the court erred in giving instruction numbered 4. This instruction was as follows:

"If you should find, however, that the defendant has failed to prove to your satisfaction by a preponderance of the evidence, the allegations of his answer, that is, that Voris, the payee of the note, and the principal of the note, did make an agreement and contract with each other for a valuable consideration, to extend the time without the knowledge or consent of Shotts—if they fail to prove that, you will find for the plaintiff."

It is necessary to the release of a surety upon a promissory note, by reason of the extension of the time of payment of the note, that the extension should be for a definite period; that it should be for a valuable consideration; that it should be done without the consent of the surety, and that the holder of the note should have knowledge of the fact that the person seeking the release for such cause is a surety. *Arms v. Beitman*, 73 Ind. 85; *Prather v. Young*, 67 Ind. 480;

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Starret v. Burkhalter, 70 Ind. 285; *Abel v. Alexander*, 45 Ind. 523, 15 Am. Rep. 270; *Henry v. Gilliland*, 103 Ind. 177; *Beach v. Zimmerman*, 106 Ind. 495.

The court undertook to tell the jury in this instruction just what it was necessary for appellee to prove in order to complete his defense, and in doing so at least two essential facts necessary to be proved by appellee before he would be entitled to judgment in his favor were omitted from this instruction. This was a fatal defect in the instruction. An instruction which undertakes to set out the material facts necessary to be proved in order to maintain an action or defense must be correct and complete. *Jackson School Tp. v. Shera*, 8 Ind. App. 330; *Kentucky and Indiana Bridge Co. v. Eastman*, 7 Ind. App. 514.

It is contended by counsel for appellee that the charge is good so far as it goes, and is not liable to the objection made, and that if appellant desired the instruction to be more complete, it was his duty to ask the court to give an additional instruction covering the points alleged to have been omitted, and the error, if any, would have been in the refusal of the court so to instruct the jury. It was said by this court in the case of *Kentucky & Indiana Bridge Co. v. Eastman*, *supra*: "Counsel for appellee insist that the charge is good so far as it goes, and therefore not liable to the objection made. This view we cannot support. We cannot adjudge the charge to be good as far as it goes. It undertakes to fix a basis upon which appellee is entitled to found a recovery. In doing this, the omission of an essential feature is fatal."

There is nothing in the instructions given by the court in the case which would in any way supply the omissions or cure the error of this instruction. Counsel for appellee contend that the law as stated in the

two cases cited is in conflict with the decisions of the Supreme Court of this State, and cite in support of their contention the cases of *Smurr v. State*, 88 Ind. 504; *Fitzgerald v. Goff*, 99 Ind. 28; *Jones v. Hathaway*, 77 Ind. 14. The late case of *Todd v. Danner*, 17 Ind. App. 368, is also cited by counsel as sustaining their view of the law. Upon a careful examination of these cases we find no conflict. The point decided in all the cases cited by counsel for appellee in the Supreme Court and adhered to by this court in the case of *Todd v. Danner*, *supra*, is well stated by Howk, J., in the case of *Jones v. Hathaway*, *supra*, viz: "Where the instructions given do not contain any erroneous statement of the law, and are objected to upon the ground that they do not fully state the law upon all the issues in the cause, it is incumbent on the objecting party, if he desires to make his objections available in this court, to ask the trial court for additional instructions covering the omitted points. If the party fails, in such a case, to ask the court for such instructions, he can not, by merely excepting to the instructions given, get such an error into the record as will be available to him on appeal, in this court."

The law as above stated by our Supreme Court is applicable to cases where upon a given statement of facts the jury is correctly instructed that certain legal conclusions follow. The same facts may have an additional legal effect within the issues of the cause being tried, and if either party to the action desires such other legal effect brought to the attention of the jury, he must ask for additional instructions to supply the supposed omission in the one given. The trouble with the instruction under consideration was that it was a defective statement of the material facts necessary to be established, and an incorrect statement of their legal effect under the issues tendered in this

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cause. It was not correct as far as it went, either in its statement of fact or law. The error is properly presented to the court, and appellant's contention must be sustained. The judgment is reversed, with instructions to the lower court to sustain the motion for a new trial.

HASKELL ET AL. v. GALLAGHER ET AL.

[No. 2,592. Filed May 20, 1898.]

MECHANIC'S LIEN.—*May be Acquired on Oil Well.*—A lien may be acquired on an oil well for labor performed and fuel furnished in drilling such well, under the provisions of section 7255, Burns' R. S. 1894.

From the Jay Circuit Court. *Affirmed.*

Frank H. Snyder, George W. Bergman, Jacob Denney and James Moran, for appellants.

J. J. M. LaFollette, O. H. Adair and J. A. M. Adair, for appellees.

BLACK, J.—Demurrers of the appellants for want of sufficient facts to the complaint of one of the appellees and to cross-complaints of the other appellees were overruled. Each of these pleadings showed that the appellants, being tenants under an oil and gas lease of certain land, for the term of five years and as much longer as gas and oil should be found in paying quantities on said land, caused to be erected thereon an oil and gas derrick, and contracted with one Peter Ogle to drill a well for oil or gas where the derrick was located. One of the appellees furnished natural gas to said contractor for fuel with which to run the engine by which power was supplied for drilling the well. All the other appellees performed labor in the drilling of the well under the employment of said contractor.

It was alleged in the complaint and each of the cross-complaints, that the well so drilled "is now a

producing oil well, and that the derrick, drive pipe, pumping outfit, boiler, engine and connections, lead and steam pipes are all attached and constitute a part of said oil well and structure." The pleadings each contained the usual and proper averments for the enforcement of the statutory mechanic's or material man's lien under a notice thereof exhibited with each pleading; and upon trial of issues formed, the court in pursuance of its findings, rendered judgment enforcing liens in favor of the appellees upon the leasehold interest of the appellants. The controlling question to be decided is whether or not a mechanic's or material man's lien may be had and enforced for labor done and fuel furnished in drilling an oil well.

The statute under which the appellees proceeded, section 7255, Burns' R. S. 1894, provides, that contractors, etc., and "all persons performing labor or furnishing material or machinery for erecting, altering, repairing, or removing any house, mill, manufactory, or other building, bridge, reservoir, system of water works, or other structure, may have a lien," etc. If the appellees could claim the benefit of this statute it would seem that it must be upon the ground that an oil well as described in the pleadings is a "structure" within the meaning of that word in the connection in which it is used in the statute. The term, when applied to a material thing made by human labor, whether considered etymologically or with reference to common usage, or with regard to the words by which it is immediately preceded in the statute, means something composed of parts or portions which have been put together by human exertion.

We are not left to rely upon our own knowledge or common usage as to what is meant and understood by the expression "an oil well," but the thing to which

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that name is applied in the pleadings is there described, in language which we have quoted. It consists, when ready for its useful purpose, of much more than the mere hole in the earth, in the drilling of which the appellees performed labor or furnished material. Not only was the oil well, a portion, the most important portion, of which was made by labor and fuel furnished by the appellees, a structure in the literal sense, but when it is regarded in connection with the structures specifically named in the statute, it must, we think, be considered as within the legislative intent in the use of the statutory phrase "other structure." For performing labor or furnishing material for the making of any part of such a structure, though it be in the drilling of the hole for the insertion of the tubing through which the oil may flow or may be pumped, a lien may be had under the statute.

In *McElvaine v. Hosey*, 135 Ind. 481, 492, it was said that the boiler, engine, shafting, beam, derrick, reel, ropes, and drill, when put in place and action, in drilling a gas well, constitute, not a mill, but a structure within the meaning of the statute above mentioned. If such appliances for making a gas well be a structure, it would seem that a completed oil well with all its appliances, including the drilled hole in the earth, with its tubing, should also be regarded as within the meaning to which the language of the statute may legitimately be expanded in its application by the courts. The judgment is affirmed.

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[No. 2,016. Filed Oct. 15, 1897. Rehearing denied May 25, 1898].

EVIDENCE.—*Reversal of Cause*.—Where there is no evidence to sustain the judgment the cause will be reversed. pp. 235-237.

APPEAL AND ERROR.—*Parties*.—A codefendant who was not a party

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to the judgment is not a necessary party to an appeal from such judgment, pp. 237, 238.

From the Madison Circuit Court. *Reversed.*

W. A. Chipman, S. M. Keltner and E. E. Hendee,
for appellant.

George M. Ballard and William A. Kittinger, for
appellee.

WILEY, C. J.—Appellee sued appellant and one Philip Matter and recovered a judgment against the appellant, from which this appeal is prosecuted. The complaint is in one paragraph, and avers that on and prior to December 9, 1892, appellant and one Philip Matter were indebted to appellee for work and labor and materials furnished to them, etc., and that appellee owned \$10,000.00 of stock in the appellant corporation; that appellee was indebted to appellant and Philip Matter for labor, materials, etc., and that on December 9, 1892, said Matter was the president of said glass company, and on said day appellee and appellant and said Matter, acting for himself and said glass company had a full and complete accounting between them and made a full and final settlement of all their accounts; that it was then and there agreed and determined between appellee, appellant and said Matter that appellant and Matter were indebted to appellee on account, in the sum of \$1,680.74, and the further sum of \$416.67, as the amount due him for the unexpired term of his service, as salary as superintendent of appellant corporation; that appellant and Matter were to take appellee's stock in appellant corporation and pay him \$5,000.00 therefor, making a total indebtedness due appellee of \$7,097.41; that it was agreed and settled at that time that appellee was indebted to appellant and Matter for lumber, building materials, etc., in the sum of \$1,922.00, which should be, and was

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deducted from the amount of appellee's indebtedness as above, and which left a balance of \$5,175.41 due appellee; that of said amount the sum of \$3,523.32 had been paid at the time the action was commenced, leaving a balance due appellee of \$1,652.09. The complaint further avers that the appellee over-paid one Burke \$214.39, which appellant and Matter owed him, and for these two amounts he demanded judgment. A joint answer was filed in four paragraphs. First, general denial; second, a plea of payment; third, it was admitted that the appellee was the owner of \$10,000.00 of stock in the appellant corporation; that the appellee sold and transferred the stock to said Philip Matter for the sum of \$5,000.00, and that it was agreed that the \$5,000.00 should be paid to the appellant, the Anderson Glass Company, and that it should pay of that amount what might be due to the appellee after deducting and taking therefrom any and all amounts that were then and might thereafter become due from the appellee to the appellant; that the sale of stock was on the 9th of December, 1892, and that at that time and prior thereto the appellee was in the employ of the appellant as superintendent, at a salary of \$5,000.00 a year; that on said day appellee tendered his resignation as such superintendent, and that on said day and for a long time prior thereto, the appellee had been purchasing material, lumber, stone, gas fittings, etc., and using them in the erection and construction of dwelling houses; that the appellee purchased the same upon the credit of the appellant, and that this fact was unknown to the appellant at the time of the purchases, and at the time of the alleged settlement it was not known by the appellant how much the appellee was indebted to the glass company on account of such purchases; that it was further agreed between the appellee and appellant that of any

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amount that might then be due or owing to the appellee on account of salary or otherwise, and the amount of \$5,000.00 to be paid said Matter to the glass company, there should be deducted any amount of indebtedness incurred by appellee in the name and upon the credit of the appellant, and that the sum so paid by Matter to the glass company should be held by it until all bills incurred by appellee on the credit of said glass company should be fully paid and satisfied, and that if there should anything remain due after such payment it should be paid to the appellee. This paragraph of answer then sets out an itemized statement of the several amounts which it claimed had been paid on account of the facts hereinbefore stated, including cash paid directly to the appellee, and concludes by averring that on account of such payments being equal to the amount due from appellant to appellee, that there was nothing remaining due to the appellee. The fourth paragraph is in the nature of a set-off, in which it is stated, in brief, that the appellee was indebted to the appellant in the sum of \$7,034.67 for money paid to the appellee, and paid for the appellee for his use and benefit, and for labor and material furnished to the appellee by the appellant, and asks that said sum be set off against any amount that might be found due the appellee. Both the complaint and the fourth paragraph of answer are accompanied by bills of particulars.

At the proper time in the proceedings below, the appellant, the Anderson Glass Company, filed its motion for a new trial, which motion was overruled, and to which ruling the appellant excepted. One ground in the motion for a new trial was based upon newly discovered evidence, and this was supported by several affidavits. The trial court permitted the appellee

to file counter-affidavits over the objection and exception of the appellant.

In this court appellant has assigned error as follows: First. Overruling its motion for a new trial. Second. That the complaint does not state facts sufficient to constitute a cause of action. Third. In permitting the appellee to file counter-affidavits in answer to affidavits of appellant in support of its motion for a new trial.

The important and pivotal facts upon which the decision must rest as disclosed by the record are as follows: Appellant was a corporation organized and existing under the laws of the State of Indiana, and established and built a plant at Anderson, Indiana, for carrying on its business. Appellee was employed as superintendent and was put in charge of the construction of the buildings, machinery, etc., in which and by which appellant was to carry on its business. He was also put in charge of superintending the erection of twenty tenement houses for appellant, which were to be occupied and used as dwellings by its employes. During the time of the construction of these buildings, appellee was engaged in the erection, on his own account of seven houses, one of which was to be used by himself, and the others were to be used as tenement houses. Appellant was paying appellee a salary of five thousand dollars a year, and in December, 1892, it coming to the knowledge of appellant's officers that appellee was building several buildings on his own account and superintending their construction, the president of appellant, Philip Matter, demanded of appellee that for the time he had consumed in the erection of his own buildings he should allow a deduction from his salary. Or, in other words, he should allow a credit on his salary for the time occupied in superintending the erection of his own build-

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ings in the sum of \$100 each for the houses he was erecting. This proposition he declined to accede to, and after some further controversy about it, he tendered his resignation as appellant's superintendent, which was accepted on the 9th day of December, 1892. At the time of his resignation and prior thereto he owned stock in the appellant corporation to the amount of \$10,000.00, and on December 9, 1892, appellant's officers and the appellee met together for the purpose of effecting a settlement. At that meeting an agreement was made by which appellee sold his stock to Philip Matter for \$5,000.00. It was also then agreed that appellant was indebted to appellee for salary, etc., in a fixed amount. It was then and there contended by appellant, and admitted by the appellee, that he was indebted to appellant in an unknown sum for materials, money, etc., which appellee had used in the erection of his private houses. Up to this point, on the material facts in the case, there is no controversy. As to the indebtedness from appellee to appellant, appellant contends that it was then and there agreed between them that the amount of such indebtedness should be ascertained as soon as possible, and whatever that amount should be, should operate as a payment upon the amount due appellee from appellant. On the other hand, appellee contends, that at the same time, to wit, December 9, 1892, it was agreed by and between him and the appellant that his indebtedness to the appellant was \$1,922.00, and that the settlement then and there made was full and complete, and embraced all the differences between them.

This is one of the disputed questions in this appeal and we must look to the evidence for its determination. It is averred in the complaint that there was a full, complete and final settlement between appellant and appellee embracing all matters of difference be-

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tween them, and it is contended by appellee's counsel that the evidence supports this averment. We have searched the record in vain to find any evidence to support this contention. True, in answer to a question propounded to him, the appellee stated that the amount due from him to appellant December 9, 1892, was \$1,922.00. But even the appellee himself does not testify that that amount was ascertained and agreed upon at that time. On the contrary, he admitted that he did not furnish to the appellant a statement of his indebtedness to it until about January 9, 1893. In his examination in chief, appellee was asked the following questions and made the following answers: "Q. Now, Mr. Brakeman, you may state what there was left on that occasion on the 9th day of December for you to settle except your account with them for lumber that went into the seven houses. A. It was lumber and all kinds of material. Q. What else except that was left unsettled between you on that day? A. That was all. Q. If I understand you you sold your stock to Matter for \$5,000.00? A. Yes, sir. Q. And where was he to pay that money, how was it to be paid to you? A. Now, he said, 'You owe the Anderson Glass Company for material you took for the houses. And they owe you a balance for salary. Now, after you make your settlement with them, if they owe you more than you owe them, of course they will give you the \$5,000.00, and if you happen to owe them more than they owe you, they will take that out of the \$5,000.00 and give you the remainder.'"

It is apparent from this that no settlement was agreed upon on December 9, 1892, as to the amount due from him to appellant. It also further appears from the evidence that at that time none of the officers of appellant knew the amount of such indebtedness,

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and could not have known it because the facts relative thereto were wholly within the knowledge of the appellee. In addition to these admissions, Mr. Charles L. Henry, a witness on behalf of appellee, stated that as to the amount of such indebtedness, there was no settlement or agreement, but that it was left open for future ascertainment. And upon this question Philip Matter, B. F. Burke and one Eastman, testified to the same facts. Upon the uncontradicted, and undisputed evidence, therefore, we must conclude that appellee has wholly failed to support that part of his complaint which counts upon a settlement, and hence the judgment cannot be upheld upon that ground.

Appellant's insistence is that by the appellee's own evidence he was indebted to it in a sum largely in excess of the amount as shown by him in his statement rendered about January 9, 1893, and for which the jury and court made no proper allowance. It is upon this theory that appellant based the first three causes assigned in its motion for a new trial, which were, "(1) Because the verdict of the jury is not sustained by sufficient evidence; (2) because the verdict is contrary to law; and (3) because of error in the assessment of the amount of recovery in this, that the same is too large."

Much of appellant's brief is addressed to a marshaling of the evidence and a discussion thereof in support of these reasons for a new trial, and its first assignment of error, which calls in question the overruling of such motion by the trial court.

Upon the question of appellant's indebtedness to appellee, and of his indebtedness to it, there were some items upon which there was no controversy. As to appellant's indebtedness to appellee, the following items are conceded by it:

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For salary, etc., due December 9, 1892.....\$1,680.74
 For salary to become due January 1, 1893... 416.67
 For stock purchased by Philip Matter..... 5,000.00

Total,\$7,097.41

As to appellee's indebtedness to appellant, he conceded the following:

On account of materials, etc., used by him in the construction of his houses as shown by his statement rendered in January, 1893..\$1,922.00
 Amount paid by appellant to appellee since December 9, 1892 3,523.32
 Amount paid by appellant to one Barnes for hardware purchased by appellee on appellant's credit 145.00.

Making the total amount for which appellant was entitled to credit, and about which there was no controversy, the sum of \$5,490.32, leaving a balance due appellee, upon that basis, of \$1,607.09.

The jury, by its verdict, found there was due \$1,350.34, for which judgment was rendered. As above stated, appellee, while acting as the superintendent of appellant, and concerning the construction of its plant and twenty tenement houses, was also building for himself and Mr. Henry seven other houses. It is an uncontroverted fact that appellee, in the construction of the seven houses, constructed them almost wholly from material, etc., belonging to appellant, or purchased by him on its credit and for which it paid. He appears from the record to have had the confidence of appellant's officers and as to the amount and value of materials used by him and purchased, which he made on the credit of appellant, he had exclusive knowledge.

To go into detail and give item by item the several separate amounts for which appellant claims it is

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entitled to credit as shown by the appellee's own evidence, growing out of the construction of these several houses out of its material and upon its credit, over and above the amount as shown by appellee's written statement, would be almost an endless, and certainly a useless task, for the evidence alone upon this point contains many pages of typewritten matters, and no good purpose could be subserved by setting it out in full. We therefore content ourselves by summarizing as briefly as possible.

We have read the evidence with very great care, considered it in all its lights, and from it we are unable to understand upon what basis, under the undisputed facts, the appellee was entitled to a judgment for the amount he recovered. From the evidence, it becomes merely a question of computation as to the amount he was entitled to recover.

As there were so many items for the jury to remember and consider, we can readily see that it would be utterly impossible for them to arrive at a numerically correct conclusion, and if there was but a slight variation between the uncontradicted facts and the amount of the verdict, we would not feel at liberty to disturb the judgment, but where the variation is so great and apparent, we feel that it would be a great injustice to appellant to let the judgment stand. Taking the evidence of the appellee alone, it clearly appears that he was indebted to appellant over the amount as shown by the statement, and for which it was entitled to credit, in an amount exceeding \$700.00. As to the several amounts aggregating the above sum, there is no evidence to contradict it, but much to corroborate it.

It is true, appellee attempts to explain these admissions on his part of the several amounts not shown in his statement, by saying that they were charged to

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him on the books of the company, or ought to have been charged to him upon his instructions, and yet, though he had access to such books and had them brought into court upon a *subpoena duces tecum*, and was asked to examine and point out and show such charges, yet he utterly failed to do so and made no showing therefrom in contradiction of his sworn admissions. There is no evidence in the record to support his contention on this point, while he is flatly and squarely contradicted by his failure and refusal to examine the books and show such charges.

The appellee was the trusted and confidential agent and employe of the appellant. He had the confidence of its officers in full measure, used its materials and credit at his pleasure, and kept his own account of the same. His own evidence and much other evidence in the record show him to be indebted to the appellant in a large sum for which no credit has been given, which seems not to have been considered and allowed by the jury, and hence appellant's contention that the verdict is not supported by sufficient evidence, and that the amount of the appellee's recovery is excessive, must prevail. Upon any possible hypothesis under the proved and admitted facts in this case, the amount of the judgment is erroneous. The limits of the amount claimed by appellee in his own direct evidence was but \$1,652.09, and deducting from this the aggregate sum say in round numbers of \$700.00, which the evidence clearly shows should operate as a credit in favor of appellant, would leave a balance due the appellee of only \$592.09, while the judgment is for \$1,350.34.

In reaching this conclusion, we have not lost sight of the wholesome rule that an appellate tribunal will not weigh the evidence where there is a conflict, nor have we invaded it in any degree. There is no con-

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flict in the evidence to weigh, while the uncontradicted evidence strongly supports the conclusion reached.

Appellee insists that the appellant has not made its codefendant, Philip Matter, a party to this appeal, and hence no questions are presented under the assignment of errors for our consideration. We do not think there is any merit in this insistence. It is true, as shown by the record, that Philip Matter was made a party defendant below, and that the record also shows that after the case was put at issue no further account was taken of him as a party to the action. On the contrary, it affirmatively appears that the judgment was rendered only against the appellant, the Anderson Glass Company. It further affirmatively appears that after the rendition of the judgment and the appeal was prayed to this court, it was granted on its filing an appeal bond in the penalty of \$2,500 with Philip Matter as surety thereon. If Philip Matter had been a judgment defendant, he could not have become a surety on the bond in this appeal. The record does not show that the appellee made any objection to his becoming surety on the bond, and this of itself is sufficient to show that the appellee recognized the fact, as it is disclosed by the record, that he was not a judgment defendant therein. He not being a party to the judgment, he was not a necessary party to the appeal. Elliott Appellate Procedure, section 141. As it appears from the record that Philip Matter had no interest in the judgment in any manner, it follows that he could not appeal, and was not a necessary party to the appeal. Elliott Appellate Procedure, section 142. See, also, *Koons v. Mellett*, 121 Ind. 585; *Wilson v. Stewart*, 63 Ind. 294; *Logan v. Logan*, 77 Ind. 558; *Easter v. Severin*, 78 Ind. 540; *Hogan v. Robinson*, 94 Ind. 138. But, further, the record shows that this is

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a term time appeal, under the provisions of section 638, R. S. 1881, being section 650, Burns' R. S. 1894, and even if Philip Matter was a judgment defendant, as the appellee contends, he was not a necessary party to the appeal under the provisions of the act of March 9, 1895 (Acts 1895, p. 179, and being section 647a. Burns' Supplement of 1897), which is as follows: "That whenever a part of any number of co-parties against whom a judgment has been taken, shall appeal from such judgment to the supreme or appellate court under the provisions of section 638, of the Revised Statutes of 1881, providing for term time appeals, it shall not be necessary to make such co-parties, on appealing, parties to the appeal, and it shall not be necessary to name them as appellants or appellees in the assignment of errors, but they shall be bound by the judgment on appeal to the same extent as if they had been made parties."

The Supreme Court has construed this statute in at least three different cases, in which it has been held that under the provisions of the act just quoted it is not necessary in a term time appeal to name co-parties either as appellants or appellees in the assignment of errors. *Smith v. Wells Mfg. Co.*, 144 Ind. 266; *Shuman v. Collis*, 144 Ind. 333; *Denke-Walter v. Loeper*, 142 Ind. 657. The statute quoted and the cases cited effectually dispose of appellee's contention adversely to him.

After carefully considering all of the facts disclosed by the record, and the rights of the parties to this appeal, we are led to the conclusion that the ends of justice will be best subserved by a re-trial of this cause, and therefore the judgment of the circuit court is reversed.

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THE COMMERCIAL CLUB OF INDIANAPOLIS v.
HILLIKER, ADMINISTRATOR.

[No. 2,169. Filed May 25, 1898.]

DAMAGES.—Death by Wrongful Act.—Complaint.—Beneficiaries.—In an action by the personal representatives for damages for the death of their decedent caused by the wrongful act of another, brought under the provisions of section 285, Burns' R. S. 1894, an allegation that decedent leaves heirs and next of kin who are entitled to damages and who have been damaged is sufficient to permit the introduction of evidence to establish who the beneficiaries were. *pp.* 242, 243.

SAME.—Death by Wrongful Act.—Elements of Damages.—Damages for bereavement, pain, or as a solatium are not recoverable in an action for death by wrongful act, the question is one solely of pecuniary loss. *pp.* 243, 244.

SAME.—Excessive Damages.—Death by Wrongful Act.—A judgment in favor of the mother for \$2,750.00 for the death of her daughter by the wrongful act of defendant is excessive, where the daughter was married and lived with her husband, but contributed her personal earnings amounting to \$2.50 per week to the support of her mother. *pp.* 243-247.

From the Hamilton Circuit Court. *Reversed.*

William A. Ketcham and F. E. Matson, for appellant.

Beckett & Doan and Christian & Christian, for appellee.

HENLEY, C. J.—This was an action to recover damages for the death of decedent, resulting from the alleged negligent acts of appellant. The case originated in the Marion Superior Court and was venued to the Hamilton Circuit Court. The complaint upon which the issues were joined and tried, was in three paragraphs.

In the first paragraph of complaint it is charged that appellant owned and controlled a public office building in Indianapolis, known as the Commercial Club Building, eight stories in height; that it is situ-

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ated and fronts on South Meridian street; that the first story is used as a banking room in front, the second to the sixth stories inclusive, for office purposes, the seventh for a cafe, and the eighth for a restaurant; that for the convenience of its occupants, etc., two elevators had been provided, one for the purpose of carrying passengers, situated in the front part, and one for carrying freight, in the rear of said building, and that access to each of them is from a wide hallway on the first floor; that the car of the rear elevator is uninclosed, except by the walls of the shaft in which it runs, said shaft being provided with automatic gates at each of the floors; that the platform of the car is about four feet wide by five feet long, and that between the platform and the walls of the shaft is a space of four or five inches, and that there is no covering upon the car, except the roof of the building; that the front elevator is used exclusively for passengers and the rear one for freight; that on August 29, 1894, the decedent, who was a young married woman, went to said building, entering the same by the front hall way, and desiring to go to the eighth floor to see some one with whom she had business, she attempted to take passage on the front elevator, but was wrongfully and negligently prevented from so doing by the servant of appellant, who was in charge of the same, and who wrongfully refused to carry her on said passenger elevator; that said servant negligently conducted said decedent to said rear elevator, and negligently placed her upon it, and negligently started it, but failed to accompany her and manage said elevator; that it could not be properly managed and controlled unless said elevator engineer was upon it; that she was unaccustomed to riding in elevators and had no knowledge or experience in managing the same, and that said servant well knew said fact; that de-

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cedent thought and believed, and was induced to believe by said servant, that said servant was upon said car, managing and controlling it; that he would not leave the same, but would carry her to her destination; that said elevator ascended at a high and dangerous rate of speed, and when decedent discovered that appellant's servant was not on it, and not knowing herself how to check or stop it, and believing that it would run out the top of said building and that she would be killed, she became frightened and terrified, and without any fault or negligence on her part she fell and was thrown from said car at the seventh floor, between the elevator car and the wall of the shaft, whereby she was killed. It is then averred that she left heirs and next of kin who are entitled to the damages, etc.

The second paragraph of complaint is substantially like the first, except that it describes the manner in which the elevator is managed and controlled by a wire rope; that the space between the platform and the car and the walls of the shaft in which it runs is between four and five inches, except at each of the floors, where the space is less than one inch, on account of projections at such floors; that at the seventh floor, she was dragged off the elevator and by reason of said projecting floor, between the platform of the car and the walls of the shaft; that said elevator was negligently constructed and unfit for use as a passenger elevator, in that it was not properly guarded and protected, and that such fact was known to appellant.

In the third paragraph it is further charged that decedent was, at the time of her death, earning \$6.00 per week; that she was living with her mother and contributed to her support and the support of her infant brother and sister.

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The sufficiency of the first and third paragraphs of complaint was challenged by demurrer, which was overruled, a general denial to each paragraph was filed, trial by jury, special verdict, and judgment for appellee. The appellant assigned errors as follows: (1) That the court erred in overruling the demurrer to the amended complaint filed February 28, 1895; (2) that the court erred in overruling the demurrer to the additional third paragraph of complaint filed February 28, 1895; (3) that the complaint does not state facts sufficient to constitute a cause of action; (4) that the court erred in overruling appellant's motion for a new trial; (5) that the court erred in sustaining appellee's motion for judgment on the verdict; (6) that the court erred in rendering judgment against appellant on the verdict.

This action is brought under section 285, Burns' R. S. 1894, which is as follows: "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." Under this section of the statute it has been held that it is sufficient in describing the beneficiaries to allege in the complaint and prove on the trial that there are next of kin who are entitled under the statute to damages. *Jeffersonville, etc., R. R. Co. v. Hendricks, Admr.*, 41 Ind. 48.

The averment in the first and second paragraphs of the complaint in this case "that decedent leaves heirs

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and next of kin who are entitled to damages and who have been damaged" was sufficient, under which the trial court could permit the introduction of evidence to establish who were the proper beneficiaries, if any, and how damaged by decedent's death. In addition to this, each paragraph of the complaint avers facts showing a legal duty to the injured party from the defendant, a breach of that duty, and that the injury complained of was proximately caused by such breach. We think that under the authority of the Supreme Court of this State, each paragraph of the complaint was sufficient to withstand a demurrer.

The next alleged error complained of by appellant was the overruling of the motion for a new trial. Are the damages excessive? The evidence in this case shows that the deceased was a young married woman, seventeen years of age, who was living with and was supported by her husband; that she left her husband, but no children surviving her; that her next of kin are her mother and minor brother and sister, aged, respectively, nine and thirteen years; that she worked out when she could procure work, and contributed her earnings to the support of her mother and brother and sister; that she received from two to three dollars per week for her work; and that her earnings amounted to \$2.50 per week to her mother. These facts were testified to by the mother alone, who was also the only witness who testified to the ability of deceased to earn money. Witness' evidence was to the effect that the deceased had at one place received \$3.00 per week, at another \$2.50 per week, and at another \$2.00 per week, and that at the time of her death she was not employed and was seeking employment.

In an action for death by wrongful act, the question is one solely of pecuniary loss. Damages for the bereavement, for pain, or by way of solatium are not re-

coverable. It being true that the damages in cases like this are limited to the pecuniary loss sustained by the next of kin of the deceased, and there being no legal obligation resting upon the deceased to contribute to such next of kin, damages will not be presumed but must be affirmatively proved. *Armour v. Czischki*, 59 Ill. App. 17; *Diebold v. Sharp*, 19 Ind. App. 474.

The facts in this case make it a most peculiar one. We have been unable to find any reported case like it in this State, or in any of the courts of this country. It is true that our courts have often held that an action would lie under our statute in favor of the father or mother or next of kin for the death by wrongful act of an adult son or daughter unmarried, who at the time of his or her death was contributing to the support of the persons for whose benefit the action was brought. *Louisville, etc., R. W. Co. v. Wright*, 134 Ind. 509; *Diebold v. Sharp, supra*. But the facts here are different. The deceased was a married woman, emancipated, without children, and was living with and was supported by her husband. It was said by this court in *Diebold v. Sharp, supra*: "The mere existence of the relationship of parent or brother or sister to the intestate, in connection with her capacity to earn for herself a certain amount weekly, and the probability that she would have lived for a certain period, cannot furnish a reasonable basis for the calculation of pecuniary loss to her kindred. Whatever may be said of an action for the benefit of relatives dependent as a wife or child, the assessment of damages in a case like the one before us must proceed, not merely upon the pecuniary ability of the deceased, but rather upon the anticipations of pecuniary benefit which the surviving next of kin are shown to have reasonable ground to indulge."

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The Supreme Court in *Louisville, etc., R. W. Co. v. Wright, supra*, said: "Here the deceased was under no legal obligation to support the next of kin for whose benefit the suit is prosecuted. In the course of nature, it is not probable that they would have survived him and thus become his heirs; nor can we presume that he would not have married. Their pecuniary loss, therefore, is not such as would have been sustained by a widow and children."

Upon the facts as found in this case, the verdict for \$2,750.00 strikes us at "first blush" as being excessive. The only evidence upon the subject is to the effect that the deceased's earnings were contributed to the mother and were worth to her the sum of \$2.50 per week. It was found by the jury that the mother's expectancy of life was a fraction over twenty-eight years. Now if we concede that deceased would, during the whole life of her mother, contribute \$2.50 per week, or approximately \$125.00 per year for twenty-eight years, we also know that \$2,083.32 will purchase an annuity of \$125.00 upon the life of a person of the age of the mother of deceased. Even this would not be a fair way to arrive at the amount of damage done by the wrongful killing of deceased, because the amount of money which would purchase an annuity during the expectancy of life of the next of kin of deceased equal to the annual contribution to their support by deceased would be an excessive judgment. It would necessarily be cut down and greatly lessened by the contingencies, which this case presents. The facts that deceased was a married woman, that she might and probably would bear children, that she was under no legal obligation to contribute anything to the support of her next of kin, that what she did contribute was earned by her leaving her home and working out by the week, that her husband might require

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her services at home; that her infant brother and sister would in a few years be in a situation to support their mother—all these conditions would go to lessen a fixed amount such as would be required to purchase an annuity equal to the annual contributions of deceased to her next of kin. Juries are not warranted in giving damages based upon their fancy, nor are they warranted in assessing damages based upon visionary estimates of probabilities or chances. Matters purely of conjecture, it seems to us, are too vague to enter into an estimate of damages merely compensatory as they must be in this case.

In the case of *St. Louis, etc., R. W. Co. v. Robbins*, 57 Ark. 377, 21 S. W. 886, the proof was that the deceased was a young married man, twenty-nine years old, and that his expectation of life was thirty-five years; that he earned and contributed to the support of his family the sum of \$540.00 per year. It was held that a verdict of \$7,500.00 was so excessive as to show that the jury had either adopted an incorrect method of calculating the damages, or was misled by sympathy. It was said in the opinion that no other conclusion could be reached by the court, knowing that an annuity of \$540.00 could be purchased for thirty-five years for the sum of \$5,692.68. And, upon the same principle, in the case of *Rose v. Des Moines, etc., R. R. Co.*, 39 Ia. 246, it was held that a judgment for \$10,000.00 was excessive when the decedent was a man twenty-four years old, of industrious and temperate habits, whose net earnings amounted to \$263.00 per year, and the judgment was affirmed only upon condition of a remittitur of \$5,000.00.

The judgment in the case at bar is so clearly excessive under the facts found, as to show that the jury must have rendered it through partiality or been misled by sympathy. It is not necessary that we express

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an opinion as to what would not be an excessive judgment in a case presenting the contingencies that this case presents.

The lower court erred in overruling the motion for a new trial. Other alleged errors of the lower court are presented by the record and discussed in the argument of appellant's counsel. It does not become necessary to discuss any other question in the decision of the cause. The judgment of the lower court is reversed, with instructions to sustain appellant's motion for a new trial.

JOHNSON ET AL. v. CLARK ET AL.

[No. 2,290. Filed May 25, 1898.]

BILLS AND NOTES.—*Drafts.*—*Acceptance.*—*Sales.*—A stock dealer bought a lot of cattle, sent them to a commission merchant for sale, and drew a sight-draft on the commission merchant in payment for the cattle as he had been in the habit of doing, being at the time indebted to the merchant for overdrafts previously made. The bank receiving the draft for collection gave the merchant notice thereof, and the merchant agreed to inform the bank in the afternoon of that day whether he would accept the draft. In the meantime the merchant sold the cattle, and after reimbursing himself from the proceeds of the sale for the amount due him for overdrafts, paid the balance to the holder of the draft and notified the bank that he would not accept the draft. *Held*, that the sale of the cattle with the knowledge of the draft, under the circumstances, did not amount to an acceptance of the draft, and that the commission merchant was not liable for the payment of the draft.

From the Marion Superior Court. *Affirmed.*

Enoch G. Hogate, James L. Clark and Newton M. Taylor, for appellants.

Thomas S. Cravens and Merrill Moores, for appellees.

COMSTOCK, J.—The appellants instituted this action against the appellees in the Marion Superior Court. The complaint and exhibit filed therewith are as follows: On the 18th day of July, 1895, Nathan Vestal, by

his bill of exchange, a copy of which is filed herewith, marked "Exhibit A," and made a part hereof, requested the defendants in the name and style of "Clark, Wysong & Voris" to pay to plaintiffs in the name and style of "Albert Johnson & Co." the sum of seven hundred and nine and 43-100 dollars (\$709.43) at Fletcher's Bank, Indianapolis, Indiana; that on said date defendants accepted said bill; that said sum is now due and unpaid, excepting a payment of four hundred and twenty-five and 30-100 dollars (\$425.30) as shown by a credit thereon. Demand for judgment for \$350.00. "Exhibit A. July 18, 1895. \$709.43. At sight pay to the order of Albert Johnson & Co. seven hundred nine and 43-100 dollars, at Fletcher's Bank, Indianapolis, with exchange. Value received—and charge the same to account of Nathan Vestal. To Clark, Wysong & Voris. Stock Yards." Indorsement on back. "Pay to G. A. Fletcher & Co. or order. Albert Johnson & Co." "I received \$425.30 from N. Vestal, a check on Clark, Wysong & Voris and paid the same to Albert Johnson & Co. J. J. Wills."

The defendants answered by general denial. The court found for the appellees, and rendered judgment against the appellants for costs. The appellants filed their motion for a new trial upon the following grounds, to wit: First, that the decision of the court is not sustained by sufficient evidence; second, that the decision of the court is contrary to law. The motion for a new trial was overruled, which ruling of the court is the error assigned in this appeal.

The only questions arise upon the evidence. There is no conflict of the evidence. It may be summarized as follows: At the time the sight draft mentioned in the complaint was drawn, the appellants were engaged in a general merchandise and banking business at Clayton, Hendricks county, Indiana. The appel-

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lees were commission merchants at the stock yards, Indianapolis, Marion county, Indiana. Nathan Vestal, drawer of the draft, was living in Hendricks county, and was engaged in the business of buying and selling stock, cattle and sheep, and was in the habit of consigning the same to the appellees. Mr. Vestal had been in the habit of executing sight-drafts on appellees similar to the one in suit, and they had heretofore honored the same. The day before the execution of the draft Mr. Vestal had informed the appellees at their place of business that he had arranged to buy ten head of cattle near Clayton, and that he would bring them in possibly the next day. On July 18, 1895, at Clayton, he drew the draft in suit against these cattle, said draft having been drawn in payment for the cattle. The next morning between six and seven o'clock he delivered the ten head of cattle at the stock yards, in West Indianapolis, he having driven them in from Hendricks county. He then put them in the retail yards of the appellees. Immediately after the execution of the draft the appellants mailed the same to Fletcher's Bank, in Indianapolis, for collection. Between eight and nine o'clock on the 16th Fletcher's Bank notified appellees that they had the draft for collection, and the appellees answered that they would let the bank know in the afternoon of that day what they would do about it. Between twelve and one o'clock of the 19th, and after they had notice of the draft, the appellees sold the cattle and collected the proceeds arising therefrom. The appellees sold the cattle for \$673.66, clear of all expenses. They then notified Fletcher's Bank that they would not honor the draft. Mr. Vestal was owing them a balance of \$248.36 for overdrafts theretofore executed, and they took said amount out of the proceeds of the sale of said cattle, and paid the remainder, \$425.30, to

Mr. Vestal; and he paid the same on the draft. At the time of the execution of the draft in suit the appellees had no money in their possession belonging to Mr. Vestal, but on the contrary he was owing them for two overdrafts. The evidence shows that Mr. Vestal always drew a draft against each lot of cattle bought by him, or the parties from whom he bought the cattle would come to appellees and get their money at the yards. Mr. Voris testified that the reason that they did not accept the draft in the morning was because he did not then know what the cattle against which the draft was drawn would sell for. These were the only cattle they sold for Vestal that day.

Appellees knew before they sold the cattle that the draft had been drawn against the cattle and that it was Mr. Vestal's desire that the proceeds of the sale should be applied to the payment of the draft. It is claimed by appellants that the sale of the cattle with the knowledge that the draft was drawn against them was in law an acceptance of the draft, and that therefore the judgment of the court was contrary to law, and not sustained by sufficient evidence. Appellants' learned counsel argue that inasmuch as Vestal was owing both the appellants and the appellees, and elected to pay appellants first, he proposed to do what the law permits, prefer his creditors. It must be remembered, however, that the cattle were delivered to appellees by Vestal for sale by them before they had knowledge of the draft, and without notice that he wished the cattle sold for the benefit of appellants. When a debtor has delivered to his creditor the amount due him or placed in his hands the means by which it may be realized, without conditions, the debtor loses the right of preference. Appellees did not at any time promise to accept the draft. The cattle brought \$36.00 less than the face of the draft,

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and immediately upon the sale of the cattle the bank was notified that the draft was refused.

Appellants' learned counsel further contend that in view of the circumstances of the case, the sight-draft constituted in law and equity an assignment to appellants of the proceeds arising from the sale of the cattle, and to sustain their claim cite from 1 Daniels on Negotiable Instruments, section 21, also the 2 Am. and Eng. Ency. of Law (2nd ed.) p. 1059, to the effect that "It is a general rule that an order payable out of a particular fund operates as an equitable assignment of the fund not only as between the drawer and payee, but as regards the drawee also, notwithstanding the order may not be accepted by the latter party."

In the case before us when the draft was drawn, there were no funds in the hands of the drawee. The drawer was indebted to the drawee upon former transactions. A factor to whom goods are consigned for sale has a lien upon those goods or upon the proceeds from the sale thereof, not only for any expenses that he may have incurred in connection with those particular goods, but also for the balance due him from his principal on their general account. *Johnson v. Hoosier Drill Co.*, 99 Pa. St. 216; *Bryce v. Brooks*, 26 Wend. 369; *Hidden v. Waldo*, 55 N. Y. 294; *Daniel v. Swift*, 54 Ga. 113; *Chaffraix v. Harper*, 26 La. 22; Story on Sales (4th ed.), section 97, p. 92. Chalmers on Bills of Exchange, on page 179, says: "A bill, of itself, does not operate as an assignment of funds in the hands of the drawer available for the payment thereof, and the drawee of a bill who does not accept as required by this act is not liable on the instrument." In the *First National Bank, etc., v. Ege*, 109 N. Y. 120, 16 N. E. 317, a shipper drew against the consignment upon the consignee with whom his ac-

count was already overdrawn, and transferred the property by assignment of the duplicate bills of lading to the bank which discounted the drafts. The consignees or drawees refused to accept the drafts, but afterward received the property from the carrier upon the original bills of lading. It was held by the court that the consignees had no right to apply the proceeds arising from the sale of the goods to the discharge of the balance due them from the consignor arising from other transactions, and that the bank had acquired title to each consignment to the extent of the draft it had discounted on the security of such consignment.

In the case at bar the seller had overdrawn his account; he did not transfer the property to the bank, but he delivered the cattle to the appellees. The bank had no interest in the proceeds from the sale, although Vestal was indebted to appellants. In *Waymuth v. Boyer*, 1 Ves. Jr. 416, there was an agreement communicated to the factor and agreed to by him before the goods were placed in his hands, that the goods were to be sold for the benefit of a particular creditor, and it was held that the factor could not retain the proceeds for a demand against the owner. The difference in the case at bar and the one just cited is apparent. The evidence shows a refusal to accept the draft; that it was for more than the amount realized from the sale of the cattle; that the cattle were delivered for sale by the owner, who was at the time the debtor of appellees, to appellees without notice of the draft. Appellees accounted for the amount realized from the sale of the cattle less the amount of the expenses of the sale and former overdrafts. We find no error. Judgment affirmed.

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PAXTON, RECEIVER, v. THE VINCENNES MANUFACTURING COMPANY.

[No. 2,357. Filed May 25, 1898.]

PLEADING.—*Answer.*—*Cross-Complaint.*—*Bills and Notes.*—The receiver of a bank sued a manufacturing company for balance due on a promissory note. Defendant by way of answer and by cross-complaint set up an agreement entered into by it and the president and cashier of the bank, by the terms of which defendant assigned to such president and cashier certain mill machinery and stock as collateral security for a debt owing by defendant to said president and cashier, and also to the bank, wherein it was agreed that the stock should be sold, and the proceeds, after paying the operating expenses of the mill, be applied to the payment of the debts so secured, and the surplus returned to defendant, and alleged that the money received from such sale was in excess of the debts secured, and that the surplus was not returned to defendant, asking that the amount collected from such sale be first set off against the demand, and demanding judgment for the surplus. *Held*, that defendant's demand set forth in the answer and the cross-complaint was within the definition of a set-off as provided by section 851, Burns' R. S. 1894. *pp.* 253-259.

PLEA IN ABATEMENT.—*Pendency of Prior Action.*—A prior action pleaded by way of abatement must be between the same parties or their privies, and for the same cause of action. *pp.* 259, 260.

SPECIAL VERDICT.—*Elimination of Improper Matter.*—Where a special verdict after the elimination of improper matter consisting of conclusions of law and evidentiary facts contains enough facts to support a judgment within the issues, it will be held sufficient. *pp.* 261, 262.

From the Sullivan Circuit Court. *Affirmed.*

W. H. DeWolf, for appellant.

J. S. Bays and Cullop & Kessinger, for appellee.

BLACK, J.—The appellant, Thomas R. Paxton, receiver of the Vincennes National Bank, brought his action against the appellee in the Knox Circuit Court, upon a promissory note made by the appellee to said bank, dated May 23, 1885, upon which as shown by the complaint fifteen hundred dollars had been paid. Before the issues were fully formed the venue was

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changed to the court below. There was an answer in two paragraphs, the first being a plea of payment. In the second paragraph, purporting to be a counterclaim, a demurrer to which was overruled in the court below, the appellee admitted its execution of the note in suit, and alleged, in substance, that subsequent to the execution thereof, for the purpose of securing it and a number of other notes which the appellee had executed to the bank, and which had been indorsed to one Wilson M. Tyler, who was the president of the bank, and Hiram A. Foulks, cashier thereof, the appellee executed to said Tyler and Foulks, a mortgage on a large amount of property, personal and real, which the appellee then owned; that on the 5th day of July, 1885, subsequent to the execution of said mortgage, the plant of the appellee was burned and so damaged that the appellee could not longer carry on its business; that it then had a large stock and carried a large amount of insurance on its plant; that on the 8th of July, 1885, the appellee and said Tyler and Foulks, president and cashier of said bank, for the purpose of repaying the indebtedness which the appellee then owed said bank, entered into a contract as follows: "Whereas, Wilson M. Tyler and Hiram A. Foulks hold a mortgage on certain personal property described as logs, lumber, heading, staves, and material of every kind, engines, boilers, mills, machinery, tools, buildings, sheds and other personal property of every kind, owned and used by the Vincennes Manufacturing Company, and kept and situated upon the premises occupied and used by the said manufacturing company, to said Tyler and Foulks, to indemnify them as indorsers for said company; and as whereas, said company has failed to pay certain notes indorsed by said Tyler and Foulks, now past due, and which said Tyler and Foulks have paid, and

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are liable to pay for said company, the said manufacturing company, hereby transfer, set over, and deliver, now into the possession of the said Tyler and Foulks all said property, of every description as such mortgagees, and by witness of the terms of said mortgage, to be by them disposed of as provided in said mortgage; and the proceeds of sales of such mortgaged property shall be applied in payment of operating expenses now due, and that may accrue, as provided in said mortgage, in manufacturing and putting into shape for sale all material, machinery and other property as above described, to the expenses of selling and disposing of the same, and the balance of its proceeds to be applied in payment of said mortgage and a certain other mortgage executed by said manufacturing company to the Vincennes National Bank, so far as said indebtedness now exists or may remain after collecting all insurance money due to said manufacturing company by reason of its recent fire; and after the payment of all said sums, whatever money or property shall remain shall be returned to said Vincennes Manufacturing Company. It is hereby further understood that should said Tyler and Foulks fail to apply said proceeds of sale as above stipulated, they shall then be jointly and severally liable to said Vincennes Manufacturing Company and to each individual stockholder thereof for damages for such failure." There were some other provisions not here material. The agreement was signed by the appellee and by Tyler and Foulks.

It was further alleged in the second paragraph of answer, that said contract had been in full force and effect since the date of its execution; that the appellee in all respects kept and performed all the conditions of said contract on its part; that said Tyler, the president of said bank, collected and took charge, for the pay-

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ment of said indebtedness, of property for which he never accounted to the appellee, but which he applied, as the appellee believed, upon said indebtedness. The answer set forth a list of this property, amounting to \$27,600.00. It was alleged that said Tyler, as president of said bank, received said sum of money which he realized from the sale of said articles, for the purpose of discharging said indebtedness, and that the same "was fully discharged and paid upon the whole of said indebtedness;" that the amount of said indebtedness of the appellee to said bank at said time, including the demand sued upon in appellant's complaint, was not more than \$16,000.00; that the proceeds realized from the sale of said articles "were under the control, management and direction of the plaintiff, and was by it used in its general banking business, and that it is indebted to the defendant for the overplus upon the sale of said articles in the sum of \$11,600.00, with interest thereon from the 1st day of January, 1886, up to the present time; that all of the indebtedness which the defendant owed to the plaintiff was fully paid and satisfied out of the sale of the above and foregoing articles, and there was a surplus over and above the discharging of said indebtedness to the plaintiff in its hands of \$11,600.00, with the interest thereon, which it justly owes the defendant and has refused to pay over, and account to the defendant for said sum or any part thereof; that the defendant often demanded of the plaintiff an accounting and settlement of said money, the overplus remaining in the hands of said plaintiff, which it realized from the sale of the above and foregoing articles at the prices stated herein; that it wholly failed and refused at any and all times to settle with the defendant or to account to it for said overplus or any part thereof. The defendant offers to set off against said

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plaintiff's claim any amount which may be found to be due from it to the plaintiff, and asks judgment against the plaintiff for the residue thereon remaining in its hands. Wherefore defendant demands judgment in the sum of twelve thousand dollars and all proper relief in the premises."

The appellee also filed a pleading denominated therein a cross-complaint, which counsel for appellant in argument say is in all respects the same as the second paragraph of answer, while counsel for appellee say that these pleadings are the same except that they are differently named. A demurrer to the cross-complaint was overruled. The objection urged by counsel to this pleading, thus unnecessarily duplicated, is that if it shows a cause of action it is one not against the bank or its receiver, but against Tyler and Foulks. The facts are not stated with desirable clearness.

It is alleged that a mortgage was given by the appellee to Tyler, the president of the bank, and Foulks, its cashier, for the purpose of securing the note in suit and other indebtedness of the appellee to the bank. It is alleged that the agreement set out in the pleading was entered into for the purpose of repaying the indebtedness of the appellee to the bank. The agreement by its terms provided that the mortgaged property should be disposed of by Tyler and Foulks, that the proceeds should be applied in payment of operating expenses and the expenses of disposing of the property, and that the balance of the proceeds should be applied in payment of a mortgage held by Tyler and Foulks to indemnify them as indorsers for the appellee and in payment of a certain other mortgage executed by the appellee to the bank, so far as said indebtedness might remain after collecting insurance money due to the company. The agreement provided

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for the return of the surplus to the appellee, and provided for the liability of Tyler and Foulks for failure to apply the proceeds as stipulated. It is further shown that Tyler, as president of the bank, received the money which he had realized from the sale of the property for the purpose of discharging said indebtedness, and that it was so applied; that this indebtedness, including the demand upon the note in suit, was not more than a certain amount, much less than the amount stated as the sum so realized by the sale of the property. It is alleged in effect, that the proceeds of the sale were received by the bank and used in its banking business; that all the indebtedness of the appellee to the bank was thus paid, and that a surplus in a specified amount remained in the possession of the bank, which it refused upon demand, to pay to the appellee.

It appears from the pleading that the bank retained and used a certain sum, being the surplus of money received by its president, acting as such, which he had realized from sales of property of the appellee turned over to the president and cashier for the purpose of paying the indebtedness of appellee. It may be gathered from the pleading that the president of the bank placed the entire proceeds of the property in the bank where it was used as the money of the bank, and did not return any part of it to the appellee. If the president and cashier were personally liable to the appellee, which we need not decide, still it appears that the bank by its own officers, acting as such, having appropriated and retained a larger amount than was necessary to discharge the appellee's indebtedness, was liable to him for the surplus so retained. The appellee's demand set forth in the second paragraph of answer and in the cross-complaint was within the definition of a set-off in the statute which pro-

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vides, section 351, Burns' R. S. 1894 (348, Horner's R. S. 1897): "A set-off shall be allowed only in actions for money demands upon contract, and must consist of matter arising out of debt, duty, or contract, liquidated or not, held by the defendant at the time the suit was commenced, and matured at or before the time it is offered as a set-off."

The court sustained a demurrer to a plea in abatement directed to the cross-complaint, in which the appellant alleged the death of said Wilson M. Tyler, and the appointment of an administrator of his estate, and showed that before the commencement of this action the appellee filed a claim against said estate for the same cause of action as that set forth in the appellee's cross-complaint, which claim was still pending in the Knox Circuit Court. It was also alleged in substance, in this plea, that on, etc., the Vincennes National Bank was declared insolvent by the comptroller of the currency; that the appellant was by said comptroller duly appointed receiver, etc.; and that under the instructions of the comptroller the appellant gave notice by publication, of his appointment, notifying and requiring all persons having claims against said bank to make a written statement thereof, verified by oath, and to file the same with said receiver within ninety days from the publication of the notice; and that no claim had been so filed by or for the appellee; that prior to the filing of the cross-complaint the appellant had no notice that the appellee claimed that said bank was indebted to it; that for more than six months the appellant had kept an office at Vincennes, and had been present there attending to the business of said receivership, and that a person named who claimed to have an interest in said company, and had been acting in its behalf in the filing of said claim, had knowledge of the appointment of the receiver and of

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his presence in Vincennes in the discharge of his duties.

The pendency of a prior action is not ground for abatement, if not between the same parties as those involved in the case wherein it is pleaded, or their privies, as well as for the same cause of action as that set up therein. *Dawson v Vaughan*, 42 Ind. 395; *Bryan v. Scholl*, 109 Ind. 367; *American White Bronze Co. v. Clark*, 123 Ind. 230; *Needham v. Wright*, 140 Ind. 190. If the claim alleged to be pending against the decedent's estate can be said to involve the same cause of action as that presented by the second paragraph of answer and the cross-complaint, the prior proceeding was not between the parties here contending.

Concerning the other branch of the plea in abatement, counsel for appellant are of the opinion that the claim against the bank should have been filed with the receiver pursuant to the notice given by him; but they do not state any reason why the appellee, having failed so to present the claim, may not set it up in the action brought by the receiver for the purpose of collecting supposed assets of the bank. The receiver chose a tribunal in which to litigate a claim of the bank against the company, which could not be properly adjusted without the determination along with it of the cross-claim of the company against the bank, which if allowed, would extinguish the appellant's claim and prevent a recovery thereon, while at the same time the question as to the additional amount of indebtedness of the bank to the appellee could be adjudicated in the receiver's chosen tribunal. We think the court did not err in sustaining the demurrer to this plea in abatement to the cross-complaint, or in sustaining the demurrer to a like plea to the second paragraph of answer.

The court also sustained a demurrer to the second,

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third and fifth paragraphs of answer to the cross-complaint. In the second paragraph the appellant relied upon the statute of limitations, as a defense to the entire cause of action stated in the cross-complaint, alleging that the cause of action set forth in the cross-complaint did not accrue within six years next before the commencement of this action. It is conceded by the appellant, that if the appellee's pleading should be regarded as a set-off, the statute of limitations would not defeat it, and the court's rulings would be correct. We have seen that the pleading, considered in its real character, without regard to the name given it by the pleader, is an answer of set-off. See section 370, Burns' R. S. 1894 (367, Horner's R. S. 1897). *Rennick v. Chandler*, 59 Ind. 354; *Armstrong v. Caesar*, 72 Ind. 280; *Warring v. Hill*, 89 Ind. 497; *Huffman v. Wyrick*, 5 Ind. App. 183. The third paragraph of answer to the cross-complaint alleged that the court below had no jurisdiction of the cause of action therein set forth, and stated the appointment of the appellant as receiver. In the fifth paragraph the filing of appellee's claim against the estate of said Tyler, deceased, was alleged. We are unable to see any error in the action of the court in sustaining the demurrers to these paragraphs. They showed no facts which could bar the appellee's set-off.

The cause was tried by jury, and a special verdict was rendered. The appellant's motion for a *venire de novo* was overruled. The verdict was in the form of interrogatories and answers thereto.

If conclusions of law or evidentiary facts be set forth in a special verdict, it will be a sufficient verdict, if, when such improper matter is eliminated, it contains enough facts to support a judgment within the issues. *Louisville, etc., R. W. Co. v. Berkey*, 136 Ind. 181; *Terre Haute, etc., R. R. Co. v. Bruner*, 128

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Ind. 542; *Branson v. Studabaker*, 133 Ind. 147; *Woodward v. Davis*, 127 Ind. 172; *Evansville, etc., R. R. Co. v. Taft*, 2 Ind. App. 237. The special verdict before us is in many respects unsatisfactory. It is not a straightforward and clear statement of the facts under the issues. Some of the computations are not harmonious, but the amounts upon which the computations are based being given, it is possible, by rejecting the erroneous computations and retaining the correct ones to understand the real meaning of the jury and to harmonize the verdict in this regard. There is in the verdict some reference to the evidence, without showing the fact established by it; but when this part of the verdict is ignored there are still left enough facts upon which to base a judgment. Appellant criticizes the verdict as not assessing his damages. It does show the amount of the note in suit, including principal, interest and attorney's fee. A greater amount was found due the appellee, and the verdict cannot be pronounced insufficient because it did not formally state that the appellant was damaged in the sum so found to be the amount of the note.

Upon a careful examination, which the involved character of the verdict has rendered necessary, we think that, considering it as a whole, in connection with the issues made by the pleadings, the verdict was not so defective that a judgment could not be rendered upon it. The judgment rendered for the appellee was for \$2,056.00, a smaller amount than the balance to which the appellee appears from the verdict to be entitled. This does not go to the question of the sufficiency of the verdict upon a motion for a *venire de novo*.

The appellant's motion for a new trial was overruled. In argument upon the causes assigned in this motion counsel have made but few references to the

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places in the record where the matters may be found to which the discussions relate. In the matters pointed out we have not discovered any reversible error. The judgment is affirmed.

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[No. 2,386. Filed May 25, 1898.]

APPEAL AND ERROR.—Parties.—Bills and Notes.—An indorser of a note who was made a party defendant in an action on the note to answer merely as to the assignment of his interest in the note, and who is not a party to the judgment, is not a necessary party on an appeal from such judgment. *pp.* 263-265.

BILLS AND NOTES.—Transfer.—Insolvency of Payee.—Sales.—A nursery company sold its entire stock and received in payment therefor the purchasers' notes made payable to two of the directors of the company. The directors to whom the notes were made payable assigned one of the notes to plaintiff in payment of a note held by her against the company for borrowed money, such directors being indorsers on said note. The company was insolvent at the time of the sale and transfer of the note, although the directors believed at the time that it was solvent, and acted in good faith in the transactions. *Held*, that the acts of the company in making the sale of the stock and transferring the note were valid, and that plaintiff was entitled to recover on the note against the makers. *pp.* 265-274.

APPEAL AND ERROR.—Bill of Exceptions.—New Trial.—A motion for a new trial cannot be considered on appeal, where the causes assigned therefor depend upon the evidence, where all of the evidence is not in the record. *p.* 274.

From the Jennings Circuit Court. *Affirmed.*

George F. Lawrence and Olin Bundy, for appellants.

Lincoln Dixon and T. C. Batchelor, for appellees.

BLACK, J.—The appellee Rosetta Allen brought her action against appellants, Kennedy F. Clapp and Walter M. Carson, upon a promissory note not negotiable by the law merchant, made by the appellants, payable to the order of James S. Banister and Joseph Kelly, and assigned by indorsement in writing by the payees to the plaintiff.

In the course of the proceedings, upon motion of the plaintiff, said Banister and Kelly were made additional defendants, and they answered, alleging their indorsement of the note and disclaiming all interest therein. Also, upon the plaintiff's motion, John W. Spears, receiver of the Alert Nursery Company, was made an additional defendant, and he answered, alleging that said company had no interest in said note. To these answers of said additional defendants the plaintiff replied, asserting her belief that they were true. No relief was sought by said Banister and Kelly, or either of them, or adjudged in favor of them or either of them, and no relief was sought or adjudged against them or either of them in favor of any party. The judgment appealed from was in favor of the plaintiff for the amount of the note sued on by her against the original defendants, Clapp and Carson, and they alone appeal.* In their assignment of errors they have named all of said additional defendants along with the plaintiff as appellees.

The judgment was rendered on the 19th day of June, 1896, and the transcript of the record, with the assignment of errors, was filed in this court on the 16th day of February, 1897. Under an application of the appellants filed April 1, 1898, for the issue of notice of this appeal to the administrator of the estate of said James S. Banister, deceased, and a motion of the appellees filed April 22, 1898, to dismiss the appeal, it has been made to appear that said Banister died on the 22nd day of December, 1896, and that a person named, residing in this State, is administrator of his estate, having been appointed as such December 31, 1896; that is, that said Banister died and said administrator of his estate was appointed, after the rendition of the judgment and before the filing here of the transcript and assignment of errors, naming said

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Banister as an appellee, and the application for notice to the administrator of his estate is filed more than a year after the rendition of the judgment and more than a year after the taking of the appeal. For reasons sufficiently stated in a recent decision of this court, *Doble v. Brown*, ante, 12, the application for notice to the administrator cannot be sustained. It does not necessarily follow that the appeal must be dismissed. The assignment being by indorsement in writing, it was not needed that Banister be by the plaintiff made a defendant to answer merely as to the assignment of his interest. No relief was sought against him by any other party. The appellants could appeal without serving notice upon Banister or his personal representative, for Banister obtained no judgment against the appellants, and he was not a co-party with the appellants in the judgment from which they appeal.

There was a special finding, in which the court stated the facts, in substance as follows: The Alert Nursery Company was organized in 1891, and was still in existence at the time of the trial. Immediately after its organization, it adopted rules and by-laws for the management of its business and the government of its affairs, which still remained in force, one of which provided that five of the directors of the company should constitute a quorum for the transaction of business. The company carried on a general nursery business, selling and delivering fruit trees, from the time of its organization to the 5th of June, 1894, on which day there was a meeting of the board of directors of the company at the office of its secretary, at Alert, Decatur county, Indiana, at which were present six directors—James S. Banister, William Banister, Joseph Kelly, W. H. Baker, A. B. Kiefer and Kennedy F. Clapp—all of whom participated in transacting the

business disposed of at the meeting, at which the company sold to the appellants all the stock, tools, plate books, stationery and belongings of the company, other than its outstanding accounts and notes on hand, for the agreed price of \$1,500.00. The appellants executed their promissory notes to the company for \$800.00, one note, being the note in suit, for \$300.00, payable on or before twelve months after date, one for \$300.00 payable on or before June 1, 1896, and one for \$200.00 payable on or before June 1, 1897. These notes were made payable to James S. Banister and Joseph Kelly, two of the directors, with the understanding and agreement that the said Banister and Kelly were to collect the notes and apply the proceeds to the payment of a note for \$1,200.00 held by the appellee Rosetta Allen against the company for borrowed money which she had loaned the company, the last mentioned note being indorsed by said James S. Banister and Joseph Kelly. It was agreed by and between said directors, acting for the company, and the appellants, at said meeting, when said sale was made, that \$700.00 of the purchase price should be applied on a note held by the appellant Kennedy F. Clapp for \$1,000.00 against the company. After the terms and conditions of said sale had been agreed upon at said meeting, and while the meeting was still in session, a written contract was drawn up by the secretary of said board, stating the terms and conditions of said sale, and this contract, then and there, while the meeting was still in session, was signed by W. H. Baker, William Banister, James S. Banister and Joseph Kelly, as directors of the company, and by the appellants for themselves; and some days later said contract was signed by A. B. Kiefer and N. E. Howe, as directors. After it had been reduced to writing, on June 5, 1894, at said meeting and

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before the meeting adjourned, the secretary recorded the contract in the record, as a part of the minutes of said meeting, and the same was then signed, before the meeting adjourned, by William Banister, James S. Banister, Joseph Kelly, W. H. Baker and A. B. Kiefer, as directors for said company and by Kennedy F. Clapp and Walter M. Carson for themselves. After the sale was so made, on the 5th of June, 1894, the appellants immediately took possession of the stock, tools, plate books and any and all property so purchased by them, and operated said nursery business under the name of Clapp & Carson, successors to the Alert Nursery Company. They advertised by circulating printed cards, and employed hands to work in their nursery, cultivated the trees, made sales, selling about four thousand trees, digging them up, and shipping them to parties to whom they had made sales, collected money from said sales, paid the rent for the use of the land occupied by said nursery, and in all respects managed and operated said nursery as their own. The appellants never returned or offered to return any part of said property to said company. After the execution of the note sued on herein, and before the commencement of this action, said note was assigned by indorsement thereon in writing by said James S. Bannister and Joseph Kelly to the appellee Rosetta Allen. At the time said sale was made on the 5th of June, 1894, the directors participating in the sale acted in good faith, "believing at the time the money due them from unpaid stock, notes and accounts due said company, would be sufficient to pay all the debts and liabilities;" and said sale was not made for the purpose of hindering, delaying or defrauding any of the creditors of said company. At the time the sale was made to the appellants, said company was insolvent, the entire property of the

company not being sufficient to meet the liabilities of the company. At no time since said sale to the appellants had said company claimed any interest in the property so sold, and it was not in this action claiming any interest therein.

On the 8th of February, 1896, John W. Spears was appointed receiver of said company by the Circuit Court of Decatur county, Indiana, and he was still acting as such receiver. On the 25th of September, 1894, one William L. Heaberlain recovered a judgment in said Decatur Circuit Court against said company, and on the 24th of December, 1894, an execution was issued upon said judgment, and placed in the hands of the sheriff of Decatur county. On the 26th of February, 1895, said sheriff returned said execution, with his return indorsed thereon *nulla bona*, and on the 7th of January, 1896, another execution was placed in the hands of the sheriff of said Decatur county, to enforce the collection of said judgment. On the 15th of February, 1896, said sheriff offered for sale the property that was sold to the appellants by said company on the 5th of June, 1894; and Elizabeth Heaberlain bid at said sale the sum of \$200.00, and the sheriff returned said execution with his return indorsed thereon, April 6, 1896. The property so offered for sale by the sheriff had been sold, delivered and turned over to the appellants by said company on the 5th of June, 1894. At and prior to the time of said sale to the appellants, said company "was contemplating, that is, was intending" to collect in all amounts due it, and together with the proceeds derived from the sale to the appellants, to apply the same on the debts and liabilities of said company.

Upon the foregoing facts the court stated its conclusions of law, two of which conclusions only are discussed by counsel as follows: First, that the appel-

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lee Rosetta Allen was the owner of the note in suit; second, that said sale to the appellants was a valid sale, and that by the terms of said sale the appellants became owners of the property so sold.

There has been some discussion of a motion of the appellants to make the finding of facts more specific, but such a motion does not appear to have been made a part of the record, and the matter is not embraced in any of the alleged errors assigned. The substantial merits of the cause are shown by the special finding.

It is contended, in effect, on behalf of the appellants, that, under the facts stated, the sale of the property of the nursery company to the appellants was invalid, and that the payees could not confer title to the note given for the purchase price by their indorsement thereof; that the sale being illegal, the property had rightfully been taken upon execution by a creditor of the company; and that the note, under the facts, still legally belonging to the company, there could be no recovery upon it against the appellants.

By agreement between the company selling the property for which in part the note in suit was given by the appellants, the purchasers, it was made payable to two of the directors, who were to pay the proceeds to a creditor of the company, the plaintiff, in part payment of her valid claim against the company on which the payees were indorsers. Instead of collecting the note and paying over the proceeds to her, the payees assigned the note by their indorsement to her. The indorsement was substantially an accomplishment of the purpose of all the parties under their agreement thus to pay off a debt of the company. The ownership of the note was disclaimed by the payees named in the note, and by the company through its receiver. The appellants claim, in effect,

that the transaction whereby the appellee Allen's claim against the company was thus in part paid was invalid, and that the property sold was rightfully taken from them under a valid execution against the company. The property having been sold and delivered to the appellants long before the lien of the execution could attach, the reliance of the appellants is upon the supposed invalidity of the sale to them.

The express finding of the court eliminates from the case all consideration of the effect of fraud upon such a sale as that under examination. The sale of the property for which the note in suit was given appears to have been in all respects a *bona fide* transaction. Though the corporation was in truth insolvent, its directors making the sale believed its assets sufficient to pay its debts. The note in suit, with others, was destined by agreement of all the parties, to pay an indebtedness of the corporation to the appellee Allen, a stranger, whose claim was based upon an actual loan of money to the corporation. Two of the directors were incidentally benefited, being the indorsers on the claim so to be paid. Another portion of the consideration appears to have been the payment, through the sale, of a debt which the corporation owed upon its note to one of the purchasers, the appellant Clapp, who was a director.

It does not appear that the price agreed upon between the corporation and the appellants was not the full value of the property. The property at the time of the sale was in the possession and control of the corporation, not subject to any liens. It had not passed into the control of a court for administration at that time or at the time of the sale on execution.

In *First National Bank v. Dovetail, etc., Co.*, 143 Ind. 550, it was decided that the expression that "the property of a corporation constitutes a 'trust fund' for its

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creditors," only means that when the corporation is insolvent, and a court of equity has taken possession of its assets for administration, such assets must be appropriated to the payment of its debts before distribution to its stockholders, but as between a corporation and its creditors, the former does not hold its property in trust or subject to a lien in favor of the creditors in any other sense than does an individual debtor. In that case, it was held that where a judgment was taken against an insolvent corporation, upon its consent, in compliance with an agreement thus to secure a loan of money made to the corporation by the judgment plaintiff, a stockholder, to discharge an indebtedness of the corporation upon which its president and secretary were individually liable, the proceeds of the loan being so applied, the lender having knowledge of such purpose, such judgment was a valid lien on the property of the corporation as against its creditors.

In *Henderson v. Indiana Trust Co.*, 143 Ind. 561, an insolvent corporation, whose financial condition was known by the board of directors, made an assignment of accounts which were owing to the corporation to a certain creditor of the corporation for the purpose of protecting the indorsers upon a collateral note held by said creditor (said indorsers being directors and stockholders), and by way of preference in the payment of the debt secured by said collateral note. The court decided that in such a case an insolvent corporation may, while it has the possession and control of its property, prefer any of its creditors who are not stockholders or directors of the corporation, even though the claims so preferred be secured by the indorsements of the directors and a part of the stockholders. Whether an insolvent corporation may pre-

fer a creditor who is a director or stockholder was not decided.

In *Levering v. Bimel*, 146 Ind. 545, it was said: "As between the corporation and its creditors, it cannot, in reason, be said that the relation is anything more than that of debtor and creditor. The relation of trustee and *cestui que trust* does not exist so far as to create a lien upon its assets in favor of the creditor, in any other sense than applies to an individual debtor." Referring to *Henderson v. Indiana Trust Co.*, *supra*, and *First National Bank v. Dovetail, etc., Co.*, *supra*, it was said: "By these decisions it is also, in effect, held that an insolvent corporation is not to be denied the right to prefer a creditor or creditors, when such preference does or may inure to the benefit of some of its officers who are sureties upon the claims of the creditors preferred. * * * The broad doctrine that the officers of a corporation cannot in their own names contract with it is unreasonable. Such a holding would virtually deny to corporations the credit upon which their business may be transacted. If the right of the stockholders and officers of a corporation to advance money to it to carry on its affairs, or to indorse for it to obtain money for such purpose, is denied, it would result in depriving the corporation of its most ready and frequent source of credit. If directors can lend money to the corporation, or indorses for it, under the laws of this State, they should certainly have the right to collect their debt or be secured therein as is accorded by the law to other creditors. * * * Where, however, an officer of an insolvent corporation is preferred, the rule properly asserted by the authorities is, that such act, when assailed, should be closely scrutinized by the court, and the burden will be cast upon the preferred officer to establish that he held a *bona fide* debt against the cor-

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poration." It was said that there is no more equity in allowing an individual to prefer his wife or any other member of his family, if the preferred debt be an honest one, than in permitting a corporation to prefer its own stockholders or officers, whose vantage ground in this respect is known to all who deal with the corporation or extend credit to it.

While the reasoning in *Levering v. Bimel*, *supra*, is therein limited to the case in hand, which was one of preference of debts upon which directors were sureties, yet the language of the court, as we have shown above, goes to a greater extent, to which it seems the court would have gone in its application of the law if the facts of the case had so required. The sale to the appellants was not void.

The attack made upon the sale to the appellants is not urged, and does not appear to have been at any time urged, by or on behalf of any or all of the creditors of the company. The sale was made to two persons, one of whom does not appear to have been a member of the company, while the other was a director. They alone are asserting the invalidity of their purchase. The appellant Clapp, who, with his co-appellant, took possession of the property and enjoyed it as an owner, selling a considerable portion of it, and never returning or offering to return any portion to the company, is not in a position to claim the invalidity of the sale because thereby a claim of his against the corporation was paid. The application of the remainder of the consideration to the payment of the just claim of the appellee Allen, without fraud, did not, under the decisions to which we have referred, render the sale invalid by reason of the fact that two of the directors were sureties for the company thereon. The fact that the property was sold on the execution

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did not render the sale to the appellants invalid, or affect the right of recovery upon the note in suit.

A motion for a new trial was overruled, but the causes assigned therein cannot be considered, for the reason that the bill of exceptions by which it was sought to bring the evidence before us affirmatively shows that certain evidence was introduced which does not appear in the bill. The judgment is affirmed.

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GREENE COUNTY.

[No. 2,398. Filed May 25, 1898.]

SPECIAL VERDICT.—*Sufficiency.*—A special verdict in an action against a board of county commissioners to recover for work and labor performed in preparing plans and specifications for a public building which shows that the board adopted the plans and received bids on them, and afterwards rejected them on account of imperfections therein is sufficient to support a judgment for defendant, where it was also shown in the verdict that plaintiff agreed that if his plans were not used in the construction of the building he was to receive no pay for them.

From the Sullivan Circuit Court. *Affirmed.*

William L. Slinkard, for appellant.

A. G. Cavins, *E. H. Cavins* and *W. L. Cavins*, for appellee.

ROBINSON, J.—In his first paragraph of complaint appellant alleges that appellee is indebted to him in the sum of \$300.00 for work and labor performed and traveling expenses incurred at the special instance and request of appellee, a bill of particulars of which is filed with the paragraph. The second paragraph averred that appellee employed appellant to prepare plans and specifications for a county sheriff's residence and jail, for which appellant was to receive five per cent. of the estimated cost of the building, which estimated cost was \$5,000.00; that appellant performed his

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part of the contract, and that said plans and specifications were adopted by appellant, and the letting of the contract advertised under said plans and specifications. The third paragraph differs from the second only in the estimated cost of the building, which was \$4,500.00, and that appellant was to receive traveling expenses. Appellee answered by general denial.

The special verdict shows that appellant, at the request of appellee, furnished plans and specifications for a jail and sheriff's residence, which plans were filed in the auditor's office; that appellee advertised for and received and opened bids on said plans; that said plans and specifications were then abandoned by appellee on account of imperfections therein, and were not used by appellee in the construction of any building or jail residence; that appellant agreed with appellee that his plans should be abandoned by appellee without any compensation to him for the same; that there was an agreement between appellant and appellee that appellant should not be paid for said plans in case they were not used by appellee in the erection and construction of the proposed jail residence. The jury further answered in the special verdict that appellee at the June session, 1894, orally adopted said plans and specifications and agreed to pay for such plans in case they were adopted, and that appellant's services in preparing said plans and specifications were worth \$170.00.

It is argued by appellant's counsel that the verdict is contradictory and ambiguous, and that the motion for a *venire de novo* should have been sustained. But construing the verdict as a whole, which must be done, we think the verdict sufficiently certain to support a judgment. It is found that appellant agreed that if his plans were not used in the construction of the particular building he was to receive no pay for them, and

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that the plans were abandoned on account of imperfections. It is true that the jury found that the board adopted the plans, and received bids on them. But this is not necessarily inconsistent with the other findings. The jury must be understood as saying that they were adopted for the purpose of receiving bids. If they were imperfect, and a contract could not be let upon them, they were useless to appellee. Taking the verdict as a whole, it is clear that appellee did not adopt the plans and specifications in the first instance in the sense of adopting and using them in the construction of the building, in which event, only, appellant was to receive pay.

The special verdict does not show a different contract from the one mentioned in the complaint. Under the general issue appellee could show that appellant had not complied with the contract by failing to furnish such plans and specifications as could be used. Appellee, under the issues, had the right to show any state of facts that would negative appellant's right to recover in the cause of action stated in his complaint. If appellant furnished imperfect plans that could not be used he had no right of action. The findings of the jury that the plans were imperfect and were abandoned on account of imperfections and were not used by appellee, are conclusive as to those facts. The special verdict is clearly within the issues presented by the pleadings. As the verdict shows that appellant was not to receive anything for the plans if they were not used and that they were abandoned because of imperfections, it is not material as to what appellant's labor was worth in preparing the plans. Judgment affirmed.

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WALTERS v. STOCKBERGER.

[No. 2,485. Filed May 25, 1898.]

WORDS AND PHRASES.—*Construction.*—*Rules of Court.*—*Change of Venue.*—Where a rule of court requires that applications for change of venue must be made by the second Wednesday of the term of court, an application made on the second Wednesday is a sufficient compliance with the rule. pp. 279, 280.

MARRIAGE.—*Contract of Marriage.*—No particular form of words is necessary to constitute a marriage contract. p. 282.

BREACH OF MARRIAGE PROMISE.—*Repudiation of Contract.*—*Action for Breach.*—Before an action can be maintained for the breach of a marriage contract it must be alleged and proved that the contract has been repudiated, and such repudiation must be shown by the acts, words, or conduct of the party who so repudiates it, and to be without sufficient reason or cause. A mere request for a postponement of the marriage ceremony for reasonable cause does not amount to a repudiation or renunciation of such contract. pp. 282-289.

From the Miami Circuit Court. *Reversed.*

G. W. Holman and Conner & Rowley, for appellant.

M. A. Baker, James H. Bibler, M. L. Essick and Nott N. Antrim, for appellee.

WILEY, J.—This was an action by appellee against appellant to recover damages for an alleged breach of a marriage contract. The suit was commenced in the Fulton Circuit Court. The venue was changed to the Miami Circuit Court, where a trial was had before a jury, and a verdict returned in favor of appellee, awarding her damages in the sum of \$4,200.00. Pending appellant's motion for a new trial, the appellee entered a remittitur of all the judgment but \$1,200.00, whereupon the motion for a new trial was overruled, and final judgment pronounced.

As no question is presented by the assignment of errors as to the sufficiency of the complaint, and the affirmative paragraph of answer, we will but notice

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them briefly. The complaint was in two paragraphs, and in the first paragraph it is alleged that the appellee was on November 28, 1894, an unmarried woman, and that by the mutual agreement of the parties, appellant agreed and promised to marry her on December 14, 1894; that on said day she was ready and willing to marry him, but that he neglected and refused to marry her, and he has ever since so neglected and refused. The second paragraph is like the first as to the promise and breach, and differs from it only in that it is averred that relying upon appellant's promise, she made preparation for such marriage, at considerable expense, and that in such preparation the appellant participated, etc.

The answer was in one paragraph, and it is therein averred that at the time said promise was made, which promise he denied, appellee was an unchaste woman; that the same was unknown to him, and that without the connivance of appellant, she did, on a certain day, have illicit carnal intercourse with a person named, and that appellant was then ignorant thereof. The answer contained a denial of all other matters in the complaint not therein specifically denied.

The errors assigned are as follows: (1) The court erred in granting a continuance * * * on the application of the appellee. (2) The court erred in granting a change of venue * * * on the affidavit of appellee. (3) The court erred in overruling appellant's motion to strike out affidavit for change of venue. (4) The court erred in overruling appellant's motion for a new trial. The first error assigned is expressly waived by appellant, and we will consider the remaining questions in the order counsel have discussed them. The second and third specifications of the assignment of error, do not present any questions, but the points involved therein, are properly saved in

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the motion for a new trial, and presented by the fourth assignment of error.

On February 12, 1896, being the ninth judicial day of the February term, 1896, of the Fulton Circuit Court, the appellee filed her motion, supported by affidavit for a change of venue from the county, and over appellant's objections, the motion was sustained, and the venue ordered changed. The reason assigned in the affidavit for the change was that appellant had an undue influence over the citizens of said county, and that by reason thereof she could not have a fair and impartial trial therein. Appellant makes no objection to the form and substance of the affidavit, but contends that it was not filed in time, under a rule of court then in force. The rule referred to is as follows: "All applications for a change of venue must be made by the second Wednesday of each term, or the right shall be deemed waived;" * * * The complaint in the case at bar was filed on December 24, 1894, and summons issued the same day. We judicially know that the February term, 1896, of the Fulton Circuit Court commenced on the first Monday of February, 1896, being the third day of said month. On the 12th of February the affidavit for a change of venue was filed. That was on Wednesday, the ninth judicial day of the term, and the second Wednesday. The question is properly presented by a bill of exceptions. The order granting the change contained the following entry: "For the reason that it has been the universal practice, under rule six of the rules of this court, to allow motions for a change of venue to be filed on the second Wednesday of each term, and to grant changes of venue from the county on affidavit and motion filed on such second Wednesday." We do not understand why the court made this entry, and are clearly of the opinion that it does not add any force to the rule of the court quoted.

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As we have seen, the rule provided that motions for change of venue should be made "by" the second Wednesday. It seems to us that a reasonable construction of the rule would be to hold that the word "by" does not mean that the application must be made before the second Wednesday, but is broad enough to include such day, and that if the application is then made, it is a sufficient compliance with the rule. It was held in Alabama that where an order required a plaintiff to give security for costs *by* the next term, it was a compliance with the order if the bond was filed any time at or before the next calling of the cause during the term to which the cause was continued. *Reese v. Billing*, 9 Ala. 265. In that case the court said: "There is nothing so potent in the terms 'by the next term,' etc., as to conflict with this conclusion. It is clearly allowable, consistently with the rules of interpretation, to construe 'by' to mean 'on,' or 'at.'"

In Montana it was held that an order of court to file certain papers *by* a certain day, was complied with by filing them on that day. *Higley v. Gilmer*, 3 Mont. 433. It has also been held that a rule to plead *by* a particular day, that such day was construed to continue until the office was open the next day, or morning. *Orley v. Bridge*, 1 Doug. 67. But aside from this construction of the rule, we do not think there was any reversible error in sustaining appellee's motion for a change of venue. If, as appellant contends, the application was not made in time, under the rule, it was a matter largely within the discretion of the trial court, and it not appearing that such discretion was abused, or that the appellant was injured thereby, there was no error in sustaining the motion. This disposes of the second assignment of error.

The appellant moved to strike out the affidavit in support of the motion for a change of venue, and this

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motion the court overruled. This ruling is the basis of the third assignment of error. What we have said as to the second assignment of error, applies with equal force here, and this leads to the conclusion that there was no error in overruling appellant's motion.

Appellant assigned thirteen reasons for a new trial, and the overruling of such motion is challenged by the fourth assignment of error. The first ground for the motion was that the verdict is not sustained by sufficient evidence, and counsel have argued this at some length. Appellant insists that there is not sufficient evidence to show that any marriage contract was ever made between appellant and appellee, and hence the evidence is insufficient to support the alleged breach. This insistence is not maintainable. Briefly stated, it appears from the evidence that appellant was a widower, about sixty-six years old, and that appellee was a widow, about twenty-four years old. They both had children, those of the appellee being infants. Appellant was a retired farmer and was worth probably about \$20,000.00. The appellee was in indigent circumstances and was receiving charitable donations. Up to about the 23rd of November, 1894, they were strangers to each other, and through some ladies, who were making some provision for appellee, appellant heard of her, called on her and gave her some assistance in a financial way. The appellee testified that on or about the 28th day of November, 1894, appellant proposed marriage to her; she accepted the proposal and that they mutually agreed to marry each other, and that said marriage should be consummated about December 14, 1894. Appellant in his own behalf, denied these statements, and testified that no contract of marriage was ever made between them; that the matter was never talked of, and while he admitted that he was at the home of the appellee on one or more

occasions, he says he went to inquire about her welfare and condition and to minister to her temporal necessities.

Where there are no legal disabilities existing, an offer of marriage by one person to another, and an acceptance of such offer, such offer and acceptance constitute a marriage contract. No formal words are necessary, and it is sufficient if both parties understood it to be an offer of marriage. An additional element of the contract is, that the acceptance must be made known to the party making the offer. As there must be a consideration to support all contracts, so there must be a consideration in a marriage contract, and the mutual promises of the parties constitute the consideration. As to these elementary principles, we cite 4 Am. and Eng. Ency. of Law (2nd ed), pp. 882 to 889, and authorities there cited. There being some evidence that there was a marriage contract, and that question having been submitted to the jury and determined by them, we cannot disturb the judgment on that ground.

There is some conflict in the evidence as to dates when appellant and appellee met, and when the contract was finally consummated, as testified to by appellee, but it is not our province to reconcile this conflict, and in any event the exact dates do not constitute the essence of the contract.

Counsel for appellant insist that the short acquaintance between appellant and appellee, the disparity in their ages, and the fact that the evidence shows that there were no acts or manifestations of love or affection between them, are enough to discredit the appellee. These were all questions the jury had before them and doubtless weighed, and we cannot consider them.

Appellant next contends that the evidence wholly

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fails to show that if there was a promise of marriage, and that promise was mutual, there was a breach of the contract on his part; and we are inclined to the opinion that there is some merit in this contention. The question of the existence of a marriage contract having been fairly established as determined by the jury, and the time of the marriage having been fixed, before the appellee could recover it was necessary for her to establish by a fair preponderance of the evidence, two additional facts, viz: (1) That appellant refused to marry her, and (2) that she was ready and willing to marry him. As to the latter fact, we think the evidence fairly shows her readiness and willingness to marry. She was a widow, in straightened circumstances, with two small children; she had been divorced from a former husband; the appellant had shown her some attention; he had purchased for her four dresses and had had three of them made for her; he was a retired farmer in good financial circumstances; he had furnished her some groceries and a fur wrap, and had given her five dollars with which to purchase a new bonnet. In addition to these facts, some of which strongly indicate that she was in a marrying mood, she testifies that she was ready and willing to marry appellant, and that she could not see any good reason why the ceremony should be delayed. In fact her evidence shows a burning and impatient anxiety to marry. But as to appellant's refusal to marry her, the evidence is not by any means satisfactory, and as to the facts upon this point we must look alone to appellee's evidence. According to her evidence, appellant visited her frequently, and after he had called on her a few times, he asked her, on or about November 26, to marry him. She says she did not give him any answer at that time, but promised him that she would soon. He called again No-

vember 28, and asked her if she was ready to answer his question, to which she replied that she was, and that she would marry him; that they agreed that they would marry on December 14, 1894, and that they would go either to Peru or Plymouth to get married; that after November 14, he still continued to call on her. And now, as to the question of the breach or refusal to marry her, we quote the following questions and answers. Q. "Well, were you married on the 14th of December, 1894? Ans. No, sir. Q. Did he present himself at that date? Ans. No, sir. Q. Did you see him afterward concerning it? Ans. Yes, he called there after that at my house. Q. Have any conversation with him about it? Ans. Yes. Q. What was it? Ans. He said he would wait awhile. Q. Was that after the 14th of December? Ans. Yes. Q. What reply did you make? Ans. I told him I would rather not wait; that I had everything ready and would rather go on with it."

She testified further that he called again, and they talked the matter over, and he again said he wanted to wait awhile, and that she again told him she was not in favor of waiting. She also testified that he then told her he wanted to wait awhile because his children objected to his marriage. Again she testified as follows: "Q. Do you remember of being at Phil. Stockberger's after that,—24th December? A. Yes I was there at that time. Q. Was the defendant there? A. Yes. Q. You may state to the jury what was said between you and him? A. Well, he just talked on other subjects for a while until the other ladies went out, * * * then he asked me to speak to me privately, and I told him anything he had to say he could say before Mr. Stockberger, then he asked me why I did this, and I told him he didn't do as he agreed to. I told him he promised to marry me and

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he didn't do it. Q. What did he say? A. Well he said he didn't think it was too late yet."

On cross examination the following questions were propounded to her and answered: Q. " * * * Now then, you knew on the 14, he didn't call in accordance with the statements you made, and that he came and wanted to postpone the matter. Now he hadn't stated then that he would not marry you, had he? Up to the time you filed the complaint had he ever said he would not marry you? A. I don't know whether he said that or not. I don't think he did just say that."

She then testified that on December 23, she went to Phil. Stockberger's, who was her brother-in-law, and sent for and consulted an attorney, and on the following day commenced her action. Within nine days from the time the marriage was to have been consummated, as shown by appellee's evidence, which stands uncontroverted, and even before appellant had renounced the contract or refused to marry her, we find this woman seeking solace for her wounded affections and lacerated heart in the counsel of her lawyer, preparatory to the commencement of her action for damages, and which action was commenced within ten days of the time fixed for the marriage.

According to her evidence, which stands alone upon the subject, the appellant visited appellee after the 14th of December. They talked over the subject of their contemplated marriage, and appellee says appellant went no further than to say that on account of his children, he wished to postpone the marriage for awhile, and she distinctly says that up to the time she commenced her action, he had not refused to marry her, and had not renounced the marriage contract. Even on the day the suit was commenced, he called on her, and asked her what she had done this

for (meaning commencing the action), and she replied that he had not done as he promised, and to which he replied that it was not yet too late. These facts show conclusively that appellant, up to the time the action was commenced, had not renounced the contract nor refused to marry appellee. If this is true, then there was no breach, and the action was premature. The performance of a contract may, as a general rule, be postponed by one party, even without the consent of the other, for a good and sufficient reason. To illustrate: Suppose that on the morning of the day the alleged marriage was to have been consummated, a member of appellant's family had died, and before the burial several days had necessarily expired, would it be contended, that even if appellant had not notified his *fiancee*, that the marriage would have to be postponed, that would constitute such a breach of the contract that a right of action would immediately accrue for damages? Or if appellant had been compelled to travel by rail to reach the marriage feast and had been delayed by an accident resulting in his injury, which would disable him for many days, that this would constitute a breach of the contract? We think not.

Here, as the record shows, appellant had a family of five children, all of whom had attained their majority and all were married but one. He owed at least some consideration to them, and if they were opposed to his marriage with appellee, and he knew it, it was his duty if he could to reconcile them to it, and it was not unreasonable for him to want to postpone the marriage for that purpose. The record clearly shows that neither by word, act or deed did appellant renounce his alleged marriage contract, but on the contrary shows that he intended to perform it. We recognize the rule that a renunciation of the contract carries

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with it an immediate right of action, and after the express breach, a subsequent offer to perform it, while it might be considered in mitigation, would not itself defeat a recovery. Even if a day for the marriage has been fixed, it has been held that a failure to marry on that day does not necessarily constitute a breach, as the contract is deemed to continue in force until one or the other of the parties, either by words or by conduct, shows that he or she is unwilling to fulfil the contract. *Kelly v. Renfro*, 9 Ala. 325, 44 Am. Dec. 441. The case from which we have just quoted is directly in point, and the only one we have been able to find. We approve it, because it is sound in principle and in harmony with the great weight of authority.

In *Kurtz v. Frank*, 76 Ind. 594, it was said: "If before the suit was brought, the appellant had renounced the contract and declared his purpose not to keep it, that constituted a breach for which the appellee had an immediate right of action." To the same effect in principle are the following: *Burtis v. Thompson*, 42 N. Y. 246, 1 Am. Rep. 516; *Halloway v. Griffith*, 32 Ia. 409, 7 Am. Rep. 208, note; *Frost v. Knight*, L. R. 7 Exch. 111, 1 Moak's Eng. Rep. 218. In *Adams v. Byerly*, 123 Ind. 368, it was charged that appellant promised to marry appellee on April 30, etc.; that the promise or agreement was mutual; that he refused to marry her on that date and persisted in his refusal till June 7, following, when suit was commenced. The court said: "A refusal to comply with his contract, without any apparent or sufficient reason, gave the plaintiff below an immediate right of action. Any conduct of a party who has promised to marry another, which amounts to a repudiation of the contract, renders the contract no longer obligatory on the other, and constitutes such a breach as entitles the latter to sue. Thus, where the agreement was to

marry "in the fall," and the defendant in the month of October declared his purpose not to perform the contract, it was held that the action might be brought immediately." Citing *Burtis v. Thompson*, *supra*, and *Holloway v. Griffith*, *supra*. Proceeding, the court said: "A right of action accrues upon a marriage engagement whenever the defendant by words or conduct evinces his purpose not to proceed with his contract." Citing *Kelly v. Ranfro*, *supra*.

In *Jones v. Layman*, 123 Ind. 569, appellant wrote appellee that he had heard rumors and reports about her which were derogatory to her character, and that he would not visit her until he had investigated them and learned whether or not they were true. After writing this letter, a month or more elapsed and no communication passed between them, when she commenced her action. The court said: "When all the evidence is considered, including the letter, we are not prepared to say that there was no evidence to show a breach of the contract, if a contract existed between the parties." In Kansas it has been held that a positive refusal to perform a contract to marry, even if made before the time for performance, is such breach as will authorize an immediate action for damages. *Kennedy v. Rogers*, 2 Kan. App. 764. In Virginia it was held that a repudiation of his marriage contract, *in toto*, even where no day was fixed, gave the woman an immediate right of action. *Burke v. Shaver*, 92 Va. 345, 23 S. E. 749.

We have cited these authorities in support of the universal rule that before a right of action accrues for the breach of a marriage contract, it must be averred and proved that the contract has been repudiated and such repudiation must be shown by the acts, words, conduct or deed of the party who so repudiates it, and to be without sufficient reason or

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cause. There must be a refusal to marry, or a repudiation in some way of the contract. A mere request for a postponement of the marriage ceremony for an expressed and reasonable cause, does not, in law, amount to a repudiation or renunciation of the contract, and that, at most, is what the record shows in this case. There is a total failure of evidence to support a pivotal question in the case, and in the absence of such evidence, the judgment should not stand. Even during the time between December 14, when appellee says the marriage was to have been consummated, and the 23rd day of December, when she consulted her lawyer, and up to the day the suit was commenced, appellant and appellee were in communication. She says he continued his visits to her; they talked the matter over; that he merely wanted to postpone the marriage feast, and that he did not repudiate or renounce the contract. She says there was no demonstration of love or affection between them. On her part at least, it seems to have been a mere business or mercenary transaction. Her suit was commenced with precipitous haste, and according to her own evidence (and she stands alone on the question), before any breach of the contract occurred.

Under these facts, the judgment must be reversed. This makes it unnecessary for us to decide other questions presented by the record, as they will not likely occur in a subsequent trial. The judgment is reversed, with instructions to the court below to sustain appellant's motion for a new trial.

DISSENTING OPINION.

COMSTOCK, J.—I cannot concur in the opinion of the majority of the court.

The jury found, and were warranted from the evi-

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dence in so finding, that the appellant and appellee had mutually promised to marry. Appellee was ready and willing at the appointed time to carry out her agreement. The defendant failed to appear, and his reasons and subsequent conduct only aggravated the offense. Appellee never consented to a postponement of the ceremony. Appellee, in indigent circumstances, partly dependent for the support of herself and children upon the charity of her neighbors, was doubtless flattered by the attentions of a man of comparative wealth, enjoying a social position superior to her own. It is not likely that the engagement had its origin in love. As to the woman, it may have been founded partly in her necessitous condition, partly upon gratitude for what she deemed well meant kindness. The age of appellant does not ordinarily inspire love in a woman of twenty-four, and the evidence does not disclose that he possessed special attractions other than financial, superior to those of other men at his time of life; but whatever may have been the moving cause of their engagement, it was entered into, and without the fault of appellee was broken by appellant without justification.

It is the policy of the courts to insist on good faith in all social, domestic and business relations of life. The rule should not be relaxed in favor of a man of age and experience and against a member of the weaker sex struggling with the adverse conditions of poverty. The judgment should be affirmed.

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[No. 2,459. Filed May 25, 1898.]

MARRIED WOMEN.—Deeds.—Covenants.—Breach Of.—Complaint.—

Married women are made liable upon their covenants of warranty in conveyances of their separate real estate by section 5118, R. S. 1881, and it is not necessary in a complaint to enforce such liability

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to plead the statute, or allege that the land conveyed was her separate property. pp. 292, 293.

APPEAL AND ERROR. — *Complaint.* — *Defective Averment.* — *When Assailed for First Time on Appeal.* — A complaint cannot be successfully assailed for the first time after verdict, on appeal, on account of a defective averment therein, where the fact sought to be alleged is sufficiently made to appear in the complaint that the court might properly have admitted evidence to prove the fact. p. 293.

From the White Circuit Court. *Affirmed.*

Sellers & Uhl, for appellants.

Charles C. Spencer and *Randolph J. Million*, for appellee.

HENLEY, C. J.—It is averred in the complaint of appellee in this cause that on the 6th day of October, 1894, the appellants, Josephine Dickey and Mary L. Noyes, their husbands joining them therein, for a consideration of \$650.00 executed and delivered to the appellee a warranty deed, thereby selling and conveying to the appellee the northwest quarter of the northeast quarter of section thirteen, township twenty-seven north, range five west, all in White county, Indiana, and subject to a mortgage of \$200.00, a copy of the deed is filed with and made a part of the complaint; that by said deed, the title to said real estate was warranted to appellee; that at the date of the execution of the deed aforesaid, the appellants did not have the title to the real estate therein described, but the title to the same was in other and different persons who afterward began suit in the White Circuit Court and recovered judgment against appellee quieting the title and dispossessing appellee. Notice of the pendency of said suit was given to the appellants. Damages in the sum of \$2,500.00 are demanded.

Various answers were filed by appellants to the complaint, the purport of which it is not necessary

herein to set out as no question is presented by the record except the sufficiency of the complaint. The complaint was not challenged by demurrer in the lower court. There was a trial by the court and a finding for the appellee, assessing her damages at \$150.00. Appellants' motion in arrest of judgment was overruled and judgment was rendered for the amount of the finding.

It is assigned as error, that the complaint does not state facts sufficient to constitute a cause of action. The alleged defect in the complaint which is brought to the notice of this court by the brief filed by appellants' counsel is that it does not appear by the allegations of the complaint that the real estate conveyed by appellants, Josephine Dickey and Mary L. Noyes, was their separate property; that by the common law a married woman was not liable on the covenants in her deed for failure of title to the land conveyed, and that the statute changing the rule at common law in this State, section 5118, R. S. 1881, only makes her liable in cases where she joins in the conveyance of her separate real estate. The rule at common law is stated correctly. See *Griner v. Butler*, 61 Ind. 362. By a statute of this State, section 5118, *supra*, however, married women are made liable upon their covenants of warranty in conveyances of their separate real estate, and it is not necessary in a complaint against a married woman to enforce that liability, to plead the statute, or allege that the land conveyed was her separate property. If in fact the land conveyed was not the separate property of the married woman sought to be made liable upon her warranty, her coverture is a defense to the action, the proof of which would defeat a recovery. The general disability of married women to contract has been removed by statute in this State, so that ability is the rule, and disability is the

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exception. *Voreis v. Nussbaum*, 131 Ind. 267, 16 L. R. A. 45; *Arnold v. Engleman*, 103 Ind. 512; *Haynes v. Nowlin*, 129 Ind. 581, 14 L. R. A. 787. It is also the rule of law in this State that the defense arising from coverture are personal defenses, and that where coverture is plead to an action on a contract against a married woman, the plaintiff must reply to the facts which show that the contract sued upon was one upon which she would be bound. *Johnson v. Jouchert*, 124 Ind. 105, 8 L. R. A. 795; *Bunnett v. Mattingly*, 110 Ind. 197; *Crooks v. Kennett*, 111 Ind. 347; *Potter v. Sheets*, 5 Ind. App. 506; *Arnold v. Engleman*, *supra*; *Cupp v. Campbell*, 103 Ind. 213. In this case coverture was not pleaded, and it did not become necessary for appellee to reply such facts as would make appellants liable upon the contract sued upon.

The alleged error of the lower court is not available for another reason. The complaint in this cause was good as against the defendants after verdict, and when attacked for the first time on appeal, even if appellants' contention was correct, because the fact that the appellants were conveying their separate real estate is not wholly omitted therefrom. It is defectively alleged, but sufficiently made to appear in the complaint so that the court might have properly admitted evidence to prove the fact. *Western Assurance Co. v. Koontz*, 17 Ind. App. 54. We find no error in the record. Judgment affirmed.

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[No. 2,470. Filed May 25, 1898.]

NOTARIES.—Corporations.—Acknowledgment Taken by Officer of Corporation.—Chattel Mortgage.—An acknowledgment of a chattel mortgage given to a corporation, taken by the secretary thereof, who was also a stockholder of the corporation, is void under the pro-

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vision of section 8041, Burns' R. S. 1894, although such corporation is not possessed of banking powers. *pp.* 298-308.

CHATTEL MORTGAGE.—*Corporations.—Acknowledgment by Officer of Corporation.—Notice.*—The acknowledgment of a chattel mortgage by the secretary of the corporation to which the mortgage is executed, the secretary being also a stockholder in the corporation, does not entitle the mortgage to be recorded, and the record thereof does not constitute notice to subsequent lien holders. *pp.* 308, 309.

From the Hancock Circuit Court. *Reversed.*

M. W. Hopkins, for appellants.

Hord & Perkins, for appellee.

WILEY, J.—In this action, as originally commenced, the appellee, Krag-Reynolds Co., was plaintiff, and the appellant, Walter Claytor, defendant, and the action was in replevin to recover the possession of certain personal property described in the complaint. A writ of replevin was issued, the necessary bond filed, and the sheriff took possession of the property described in the complaint and writ, and delivered the same to appellee. Whereupon appellants, George Kothe, Charles W. Wells, George Bauer and William Kothe, Jr., who are partners doing business in the firm name of Kothe, Wells & Bauer, filed a petition asking the court to be made parties defendant in said cause, which petition was granted, and they were accordingly made defendants. Thereupon the appellee filed its amended complaint, which is in the usual form of a complaint in replevin, in which it was averred that it was entitled to the immediate possession of all the property therein described, which consisted of a general stock of merchandise, etc. Appellants, Kothe, Wells & Bauer, then filed a cross-complaint, wherein it was charged that they were the owners and entitled to the possession of the property described in appellee's complaint, by virtue of a mortgage duly executed to them by Walter Claytor and his wife. The prayer

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of their cross-complaint is that they have judgment against the plaintiff for the possession of the goods, and in case the return of the property cannot be had, that they have judgment against the plaintiff for its value, to wit, \$1,000.00, etc.

As no question is in the record as to the sufficiency of the pleadings, it is only necessary to say that the case was put at issue by a general denial filed to the complaint, and a general denial by appellee to the cross-complaint. Upon the issues thus joined, the cause was submitted to the court for trial, and upon proper request, the court made a special finding of facts and stated its conclusions of law thereon.

So far as the facts are pertinent to the only question in the case for our decision, they are as follows: That the appellee was on the 14th day of September, 1895, prior thereto, and still is a corporation organized under the laws of this State, but without banking powers; that on October 14, 1895, and up to and including October 25, 1895, the firm of Walter Claytor & Co. was doing business selling groceries and other goods at retail, in Hancock county, Indiana; that on October 15, 1895, appellee made a formal demand on Walter Claytor & Co. for the delivery to it, under a chattel mortgage executed by said firm of Walter Claytor & Co., in favor of appellee, of the property described in its complaint; that said Walter Claytor refused to deliver up the possession thereof; that said stock of goods was covered by a certain chattel mortgage which was executed to secure the payment of a note of \$958.48, given by the firm of Walter Claytor & Co. to appellee, said note being dated September 14, 1895; that when said demand was made, appellee was the owner and holder of said note and mortgage, and that said note was due and unpaid; that in said mortgage it was stipulated that until the

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maturity of the note the said Walter Claytor & Co. should have the right to the possession of the goods described in said mortgage, but if said note was not paid at maturity, then the appellee should have the right to take and keep possession of such goods, etc., and they should become the absolute property of it. It was further stipulated in said mortgage, that upon failure to pay said note at maturity, appellee should have the right to the immediate and unconditional possession of the goods, and was authorized to sell the same at public sale and apply the proceeds thereof to the payment of said debt; that said mortgage was executed September 14, 1895, and acknowledged the same day by said Walter Claytor for and on behalf of said firm of Walter Claytor & Co., before W. W. Krag, a notary public; that said mortgage was duly recorded in the office of the recorder of Hancock county on September 24, 1895; that said W. W. Krag was at the time of taking such acknowledgment, a notary public in and for Marion county, Indiana, and that at said time there was outstanding one hundred shares of the capital stock of appellee, which was issued to the said W. W. Krag, part of the said shares being issued to him in the name of William Wallace Krag, and that at the time said acknowledgement was taken the said William Wallace Krag or W. W. Krag, being one and the same person, was a stockholder and director and the secretary of appellee company; that on the 2nd day of October, 1895, the appellants, George Kothe, Charles W. Wells and William Kothe, Jr., were the owners and holders of a promissory note for \$688.39, given by said Walter Claytor & Co., payable one day after the date thereof, and also a certain chattel mortgage executed by said Claytor & Co. on said day to said firm to secure the payment of said note, and that said mortgage covered and embraced the

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same goods, merchandise, etc., as those described in appellee's complaint; that said mortgage was duly executed and acknowledged and recorded; that no part of the indebtedness of said Walter Claytor & Co. to the appellee, or to said firm, has been paid; that on October 5, 1895, a writ of replevin was duly issued, and on the 6th day of October, 1895, the sheriff seized and took possession of the property described and covered by said mortgage in favor of appellee, said property also being described in the mortgage executed in favor of Kothe, Wells & Bauer, and the appellee having given bond, said property was delivered to it, and that said property was wrongfully detained by said Walter Claytor & Co.; that the said property so taken and delivered to appellee, the appellee advertised for sale according to the terms of said mortgage, and at the time and place mentioned in such notice of sale, it offered said property at public sale, and the appellee, being the highest bidder thereon, bid said property in for \$675.00, but that the actual value of said property was \$900.00, and that by the detention of said property the appellee sustained damages of one dollar.

It is further found that said property was not taken for a tax assessment, etc., against the property of the appellee, and that the same was detained in the county of Hancock, State of Indiana, from the appellee. Upon the facts thus found the court stated its conclusions of law as follows: (1) That said mortgage executed by Walter Claytor & Co., in favor of the appellee is a valid mortgage, not only against the appellant Walter Claytor, but also against all persons whomsoever, including the appellants. (2) That at the time this action was commenced appellee was, and ever has been, and now is, entitled to the possession of the property described in the complaint. (3) That

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as against the appellee, the appellants Kothe, Wells and Bauer, acquired no right to the possession of the goods, etc., taken possession of by the sheriff under the writ of replevin. (4) That the lien of the defendants Kothe, Wells and Bauer, under their said mortgage, was subordinate to the lien of the appellee under its mortgage. (5) That the appellee is entitled to judgment in its favor for the possession of the said property seized under said writ and one dollar damages.

The appellants, Kothe, Wells and Bauer, excepted to each conclusion of law, and have assigned error as follows: "That the court erred in the conclusions of law and each of them stated upon the special finding of facts." The appellant Claytor has not assigned error, and is not making any contest in this appeal. .

It appears from the special finding that when appellee's mortgage was executed, and the acknowledgment thereof taken by W. W. Krag, appellee was a corporation; that said Krag was a stockholder therein, and secretary thereof, and it is upon these facts that the appellants, Kothe, Wells and Bauer, base and rest their only contention. It is very earnestly insisted that because W. W. Krag was a stockholder and the secretary of appellee corporation, he was inhibited from acting as notary public in taking the acknowledgment of the mortgage, under which appellee claims, that such acknowledgment was a nullity and did not entitle the mortgage to record. As to the appointment and general powers and authority of notaries public, we need not advert, further than to say that in this State they are regulated by statute.

In 1852 the legislature passed an act entitled, "An act providing for the appointment of notaries public and defining their powers and duties." Section 7 of that act was as follows: "No person holding a lu-

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crative office, or being an officer of any bank, corporation, or association possessed of any banking powers, shall be a notary public; and his acceptance of any such office shall vacate his appointment as notary."

In 1891 the above section was amended, and as amended is as follows: "No person, being an officer in any corporation or association, or in any bank possessed of any banking powers, shall act as a notary public in the business of such bank, corporation or association. No person holding any lucrative office shall be a notary public, and his acceptance of any such office shall vacate his appointment as notary." Acts 1891, p. 335. See section 8041, Burns' R. S. 1894 (5966, Horner's R. S. 1897). In the enactment of this statute, the legislature evidently intended to remedy an existing, or provide against a possible evil. Without entering into any detailed or lengthy discussion of evils that might arise by officers of corporations acting as notaries public in the business thereof, it is sufficient to suggest that there is good reason and wise policy in the statute quoted. The relations that an owner of stock and an officer of a corporation bear toward such corporation are such as ordinarily preclude him from acting as a notary public in taking an acknowledgment of a mortgage or other instrument which inures to the benefit of the corporation, and in our judgment this is just what the legislature intended to prevent by the passage of the statute quoted.

Section 2108, Burns' R. S. 1894, provides a penalty for an officer or an employe in any bank, corporation or association possessing banking powers, acting as a notary public in the business of such bank, etc. It is certainly the spirit of the statute and the policy of the law, that notaries public should not act as such

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in their official capacity, where they have a personal interest that may be affected thereby.

In the case before us, W. W. Krag was not only an officer of appellee corporation, but he was a stockholder and director, owning one hundred shares of its capital stock. There is no denying the fact, it seems to us, that Krag was an interested party, because the mortgage inured to the corporation, and consequently to him, as a stockholder, etc. In *Skelton School Commissioner v. Bliss*, 7 Ind. 77, it was held that an act done by a public officer is void when it is performed in disobedience to a statute containing a positive prohibition, or to one which though not containing words of positive prohibition, imposes a penalty for the doing of the act. In the same case it was further held that where an act is done in the execution of a statutory power of a limited and particular nature, the provisions of the statute must be pursued, or the act will be void. See, also, *State, ex rel., v. State Bank*, 5 Ind. 353; *Case v. Johnson*, 91 Ind. 477. And so it has been held that an act done in violation of a statute or for the doing of which a penalty is provided, is illegal and void, and of many cases so holding, we cite the following: *Cassaday v. American Ins. Co.*, 72 Ind. 95; *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520; *Hoffman v. Barks*, 41 Ind. 1; *Union Central Life Ins. Co. v. Thomas*, 46 Ind. 44; *Williams v. Cheney*, 8 Gray 206; *Buxton v. Hamblen*, 32 Me. 448; *Aetna Ins. Co. v. Harvey*, 11 Wis. 412.

We think the great weight of authority is to the effect that an acknowledgment must be held void when taken by an officer who is disqualified to act, or who is a party in interest. In *Hubble v. Wright*, 23 Ind. 323, it was held that where the execution of a mortgage was acknowledged before one of the mortgagees, such acknowledgment was void. In Maine it was

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held that the acknowledgment of a deed by one of the grantees was a void acknowledgment and left the deed operative alone between the parties to it. *Beaman v. Whitney*, 20 Maine 413. There are many authorities holding that the acknowledgment of an instrument, taken before an officer who is a party to the instrument, or who is beneficially interested in the same directly or indirectly, is a void acknowledgment. *Bowden v. Parrish*, 86 Va. 67, 9 S. E. 616; *Davis v. Beazley*, 75 Va. 491; *Hammers v. Dole*, 61 Ill. 307; *Beaman v. Whitney*, *supra*; *Wilson v. Traer & Co.*, 20 Ia. 231; *Wasson v. Connor*, 54 Miss. 351; *Brown v. Moore*, 38 Tex. 645; *Long v. Crews*, 113 N. C. 256, 18 S. E. 499; *Clinch River Veneer Co. v. Kurth*, 90 Va. 737, 19 S. E. 878; *Groesbeck v. Seeley*, 13 Mich. 329; *Griffith v. Ventress*, 91 Ala. 366, 8 South. 312, 11 L. R. A. 193; *Jones v. Porter*, 59 Miss. 628; *City Bank etc.*, v. *Radtke*, 87 Ia. 363, 54 N. W. 435; *Smith v. Clark*, 100 Ia. 605, 69 N. W. 1011; *Miles v. Kelley* (Tex. Civ. App.), 40 S. W. 599; *Nicholson v. Gloucester Charity School*, 93 Va. 101, 24 S. E. 899; *Florida Savings Bank v. Rivers*, 36 Fla. 575, 18 South. 850; *Horbach v. Tyrrell*, 48 Neb. 514, 67 N. W. 485; *Sample v. Irwin*, 45 Tex. 567; *Winsted Savings Bank v. Spencer*, 26 Conn. 195; *Bank v. Porter*, 2 Watts 141; *Bank of North America v. Wycoff*, 4 Dall. 151, *Rothschild v. Daugher*, 85 Tex. 332, 16 L. R. A. 719, 20 S. W. 142; *Tavener v. Barrett*, 21 W. Va. 681; *Dail v. Moore*, 51 Mo. 589; *Black v. Gregg*, 58 Mo. 565; *Wills v. Wood*, 28 Kan. 400; *Hubble v. Wright*, *supra*.

As analogous to the rule established by the above authorities, it has also been held that a trustee named in a deed of trust is incompetent to take the acknowledgment of the grantor. *Stevens v. Hampton*, 46 Mo. 404; *Black v. Gregg*, *supra*; *Haney v. Alberry*, 12

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Cent. Law J. 39; *Bennett v. Shipley*, 82 Mo. 448; *Rothschild v. Daugher*, *supra*; *Clinch River Veneer Co. v. Kurth*, *supra*; *Tavener v. Barrett*, *supra*.

In Florida the acknowledgment of a deed taken by the grantee therein, was held to be void. *Hogans v. Carruth*, 18 Fla. 587. To the same effect is the case of *Green v. Abraham*, 43 Ark. 420. In Illinois and Iowa it has been held that the acknowledgment of a chattel mortgage taken before one of the mortgagees is void. *Hammers v. Dole*, *supra*; *City Bank, etc., v. Radtke*, *supra*. And we might remark here that the statutes in Illinois and Iowa on the subject of the powers and duties of notaries public are very similar to ours. In Mississippi it was held, that where a conveyance was made to a trustee, with the power of sale for the payment of debts, such trustees is disqualified, as any other grantee would be, to take the acknowledgment of the grantor. *Holden v. Brimage*, 72 Miss. 228, 18 South. 383. In *Haney v. Alberry*, *supra*, it was held that the record of a deed acknowledged before a party thereto, was not evidence against one who had no actual knowledge thereof. In North Carolina it was held that where a mortgage is acknowledged, and a privy examination taken before a justice of the peace, but the adjudication that the same is in due form and the order of registration are made by a clerk of the superior court, who is the mortgagee therein, the adjudication and order by the clerk, and the registration therein, are void. *White v. Connelly*, 105 N. C. 65, 11 S. E. 177; *Turner v. Connelly*, 105 N. C. 72, 11 S. E. 179. In *Nicholson v. Gloucester Charity School*, *supra*, it was held that the recordation of a deed of trust is ineffective as constructive notice, where the officer who took the acknowledgment was the trustee in the deed. Where a chancery clerk took an acknowledgment of a trust deed, where such chancery clerk was

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the beneficiary, it was held void. *Wasson v. Connor*, 54 Miss. 351. And so it has been held that an attempted acknowledgment of a trust deed before a notary public, who was a preferred creditor, was a nullity, because taken before an officer who was disqualified to act. *Long v. Creus, supra*.

The case of *Wilson v. Traer & Co.*, 20 Ia. 231, is in all essential respects like the one now before us. That was an action of replevin to recover possession of a mare, and the case was submitted upon an agreed statement of facts. The agreed statement showed that the mare was mortgaged to the defendants by the owner, when in possession, to secure a *bona fide* debt, which was still unpaid; that said mortgage was acknowledged in due form before J. W. Traer, a notary public, who was a member of the firm of J. W. Traer & Co., who was interested, as such partner in the mortgage; that the mortgage was duly recorded; that after the mortgage was recorded, the mortgagor, for a valuable consideration, sold and delivered the mare to a third person, and he to a fourth, from whom the plaintiff purchased her in good faith, and for full consideration paid, without any actual notice of the mortgage. The defendants, under a power of sale contained in the mortgage, seized and took the mare from plaintiff for the purpose of foreclosing their mortgage, whereupon plaintiff brought his action.

The supreme court of Iowa, in deciding the case, said: "There is but one question for us to determine in this case, and that is, whether an acknowledgment of an instrument taken and certified by a person interested in it as grantee, is so far legal or valid as to make a record of such instrument notice of the right of the grantees therein.

"It might with some show of reason be claimed, that since the acknowledgment is regular in form, and

identity of the grantee with the officer taking it, being always a matter to be shown *aliunde*, or some times, as in this case, not being even indirectly indicated upon the instrument itself, the better rule would be, to hold the record as regular, and imparting notice and leave to third parties the right to avoid both the record and instrument, by showing fraud in fact, if any existed.

"But a more critical examination of the question will show that such a rule would leave a broad door open to the perpetration of frauds, and tend greatly to unsettle the verity of our public records and defeat the purpose of our registration laws. It is always within the power of parties to secure a disinterested officer to take the acknowledgment, and it is certainly no hardship to require them to do so. There is no reason why the fundamental rule, which prohibits a person from being a judge in his own case, or an executive officer in his own behalf, should not apply to this class of executive semi-judicial duties. To hold that a party beneficially interested in an instrument is capable of taking or certifying an acknowledgment of it cannot work any possible injury to any one, while it will keep closed a door of temptation, at least, to fraud and oppression. This question has undergone judicial investigation in other states, and we refer to some of the cases with the remark that we have found no conflict of authorities."

The court then reviews many authorities, most of which we have cited, and concludes as follows: "It is the interest directly or indirectly or contingent in the conveyance itself or its subject-matter which disqualifies from taking acknowledgment. * * * We conclude, therefore, that as the officer who took and certified the acknowledgment to the mortgage was a party to it, and had a direct interest in it, that such

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acknowledgment was void, and did not authorize the record of the instrument and as a consequence, such record did not impart any notice to third persons of the mortgagee's right under it, but, as between the parties to it, the mortgage is in full force and of binding efficacy."

The case of *Hammers v. Dole*, *supra*, is identical to the one at bar, except that in that case one of the mortgagees was a firm, instead of a corporation, and a member of the firm, as a justice of the peace, took the acknowledgment of the chattel mortgage. Subsequent to the mortgage by Wheeler (since deceased) to Salzman & French, he made another mortgage to Dole, upon the same property. Both mortgages were recorded the same day. The notes secured by the first mortgage were assigned to appellants, and when they became due they took possession of the mortgaged property and advertised it for sale under the mortgage. The Dole notes were not then due, and they brought their bill in equity to enjoin the sale, alleging that the Salzman & French mortgage to be void and praying that they might be given a prior and first lien on the property. The court said: "The mortgage of appellants was void as to appellees. It was acknowledged before one of the mortgagees, who was a justice of the peace. This is against the policy of the law. An officer should not be permitted to perform either a ministerial or a judicial act in his own behalf. It would be an anomaly in our jurisprudence to permit a judge to render a judgment in his own favor. It might lead to grievous wrong. No officer should be subjected to such temptation. An acknowledgment of the execution of an instrument in writing, when required by law, should be made before an officer wholly disinterested. This court has decided that an officer

cannot execute process in his own favor. *Snydacker v. Brosse*, 51 Ill. 357. The reason for this prohibition will apply with equal force to the taking of an acknowledgment."

Herman on Chattel Mortgages, lays down the rule as elementary, that "The acknowledgment must be taken by some disinterested party; if taken by a party beneficially interested, it is void." Herman on Chat. Mortg., section 28. The same author (section 43) lays down the rule that an acknowledgment of a chattel mortgage taken and certified by a party beneficially interested in it is void, and does not authorize the record of the instrument. Jones on Chattel Mortgage says: "It being against the policy of the law that any officer should perform either a ministerial or judicial act in his own behalf," citing many authorities. Jones on Chat. Mort., section 249. Pingrey on Mort., section 216, says: "The general rule, irrespective of statutory provisions, is that an officer cannot take the acknowledgment of a conveyance to which he is a party, or in which he is directly or indirectly interested." As to the power of an officer of a corporation to take an acknowledgment of an instrument in which such corporation is a party, the case of *Horback v. Tyrrell*, *supra*, is very instructive, and in which it is held that on the grounds of public policy such an officer should be disqualified from taking an acknowledgment whose direct and beneficial interest would be subserved in having the conveyance made, which he acknowledged.

We might extend this opinion by citing and quoting from many other cases, announcing in principle, the same rules, but there seems to be no necessity for so doing.

A review of the authorities we have cited, and many others we have examined, must logically and clearly

lead to the conclusion that an officer of a corporation who is materially, directly, and beneficially interested in the execution of a mortgage or other instrument, which inures to the benefit of such corporation, and hence to his benefit, as in this instance, is incompetent to take and certify the acknowledgment thereof, and the recordation of it is not constructive notice to subsequent innocent lien holders. The authorities so hold. It is in the interest of public policy and fair dealing, and such acts are prohibited by the express language of the statute.

That W. W. Krag, who took the acknowledgment of the mortgage to appellee, was an interested party, and that in taking such acknowledgment he was acting in the business of such corporation, seems to us not to be the subject of legitimate debate. He was secretary and director of appellee corporation, and was the owner and holder of one hundred shares of its capital stock. Whatever inured to the interest of the corporation, inured also to his interest, for he was a part of it. He had to bear his portion of the losses, if any, and was entitled to share in its profits. In the case of *Winsted Savings Bank v. Spencer*, 26 Conn. 195, the court said: "A stockholder in a private corporation is interested in all its transactions, and of course in every conveyance to or from it. As the assets of the corporation are increased or diminished, his stock, which is the representative of a portion of the assets, is of more or less value." See, also, *Farmers' Union Elevator Co. v. Syndicate Ins. Co.*, 40 Minn. 152, 41 N. W. 547; 1 Morawetz on Private Corp., section 237. At section 231, the last named author says, that in incorporated companies the real parties in interest are the individual stockholders.

In *Seaman v. Enterprise Fire Ins. Co.*, 18 Fed. 250, it was said: "It only remains, then, to determine

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whether a stockholder in a corporation may have such an interest as I have indicated. [An insurable interest.] We are very clearly of the opinion that he may. It is true that the title to the property is in the corporation; that the beneficial interest is in the stockholders of the corporation. The stock of a corporation represents its property, and is evidence of the right of the stockholder to receive the profits and increase of the corporate property." *Horbach v. Tyrrell, supra*, is strongly in point here. In that case the secretary and treasurer of a corporation took the acknowledgment of a mortgage in favor of the corporation. It did not appear that he was a stockholder or interested in the corporation. There was no statute prohibiting him from acting, and after a full discussion of the question, showing that if he had been a stockholder, he would have been incompetent to act, the court concluded as follows: "We reach the conclusion that a notary public is not disqualified from taking an acknowledgment of a mortgage made to a corporation of which he is secretary and treasurer, it not appearing that he was a stockholder in such corporation, or otherwise beneficially interested in having the conveyance made." That a stockholder in a corporation is so interested as to render him incompetent to take an acknowledgment of a mortgage, etc., in favor of the corporation, we cite some recent additional cases: *Smith v. Clark, supra*; *Miles v. Kelley, supra*; *Florida Savings Bank v. Rivers, supra*.

The acknowledgment of the mortgage of the appellee, was not, under the statute and the authorities, entitled to be recorded, and hence its recordation was not notice to subsequent lien holders, without actual knowledge. Section 3352, Burns' R. S. 1894; *Allen v. City of Vincennes*, 25 Ind. 531; *State v. Dufour*, 63 Ind. 573; *Doe v. Naylor*, 2 Blackf. 32; *Bever v. North*,

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107 Ind. 544; *Hughes v. Morris*, 110 Mo. 306, 19 S. W. 481; *Brinton v. Seevers*, 12 Ia. 389; *Meskimen v. Day*, 35 Kan. 46, 10 Pac. 14; *City Bank, etc., v. Radtke*, *supra*; *Willard v. Cramer*, 36 Ia. 22.

It is unnecessary to cite additional authorities, or indulge in further discussion. From what we have said, and from the great weight of authorities, it necessarily follows that the court below erred in its conclusions of law: From the facts found, the appellee was not entitled to recover. The judgment is therefore reversed, with instructions to the trial court to restate its conclusions of law, and render judgment for the appellants, Kothe, Wells & Bauer, on their cross-complaint.

HILL ET AL. v. WARNER ET AL.

[No. 2,471. Filed May 25, 1898.]

NOVATION.—*Evidence*.—Novation is a new contract made with intent to extinguish a previous valid obligation and must be by mutual agreement of all the parties in interest; the old contract must be extinguished, and a new and valid contract made instead thereof.

From the Howard Circuit Court. *Reversed*.

Jos. C. Herron and Frank N. Stratton, for appellants.

B. F. Harness and W. R. Voorhis, for appellees.

ROBINSON, J.—Caroline Hill brought suit in replevin against appellees. Upon her death before trial appellants were substituted as plaintiffs. Appellee Warner had leased a farm from Caroline Hill, and to secure the payment of the rent had executed his notes secured by chattel mortgage. The suit was brought for possession of the mortgaged property by virtue of one of the provisions of the mortgage. Appellee Warner answered in denial, and also a novation. Judgment was rendered in appellee's favor for costs. A motion for a new trial on the grounds that the find-

ing is not sustained by sufficient evidence, and is contrary to law, was overruled, and this ruling is the only error assigned.

The only question presented and argued is whether the evidence shows there was a novation. This was the only defense attempted to be made by the evidence.

In the fall of 1895 Warner leased a farm from Mrs. Hill and took possession and executed three promissory notes, aggregating \$200.00, for the rent; the notes secured by chattel mortgage. In March, 1896, Warner moved off the premises, and on the same day one Baxter moved on. Baxter and Warner had agreed that Baxter should become paymaster for the balance of the rent Warner had agreed to pay.

Baxter testified that he and Warner went to see Mrs. Hill, that, "Mr. Warner told her that he didn't want to stay on the place; that he wanted to give up the place and let me have it, and I really can't tell just what was said in regard to it, because she was sick, and said she was not able to talk with him." The witness further said that they made no definite arrangements at all at that time, and that when witness did go back to make arrangements Warner was not with him, and that was the only time he and Warner were there together. Mrs. Emily Hill testified that she was present when Warner and Baxter saw Mrs. Hill, and that Warner requested her to release him and take Baxter, but that she refused. Mr. Woodruff testified to the same thing. There is no evidence in the record that the three parties together ever had any other conversation about the matter.

Baxter further testified: That he saw Mrs. Hill the day before he moved, and she consented to his moving and to Warner moving, and witness asked her if he should give her a note and personal security, or

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a note and mortgage; that she said, "she would let me know when I came in again which she would do. I told her that 'If I move I will do it to-morrow, for the place that I was on was sold, and I must leave it.' She said that when I came in she would tell me. When I went back she said she would do neither one—that is, after we moved." She said "that Warner's papers were to be canceled provided she took mine;" that she claimed Warner had no right to move away, and that she thought she could make him pay the rent, and that she gave this reason for refusing to accept witness's note or note and mortgage. It further appears from the evidence that after Baxter had moved in he offered to pay Mrs. Hill five dollars, the balance due on Warner's first note, but she refused to receive it, and afterwards Warner paid her this balance and took up the note. It can be said that there was an agreement that Baxter would assume the Warner debt, but this was a separate, independent transaction between Warner and Baxter. But it cannot be said that the evidence shows that Mrs. Hill agreed with Baxter to accept him as payor and release Warner; but even if the evidence established that fact it was an agreement independent of the agreement between Warner and Baxter, and would not amount to the extinguishment of the Warner debt.

Novation is a new contract made with intent to extinguish one already in existence. The doctrine is of civil law origin. It may be made by the substitution of a new contract between the same parties in place of the old one; or by substituting a new debtor in place of the old one with intent to release the old debtor; or by substituting a new creditor to whom is transferred all the rights of the old creditor. In each of these cases the extinguishment of the old debt constitutes the consideration for the new obligation.

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It has often been held that in every novation there are four essential requisites; a previous valid obligation, the agreement of all the parties to the new contract, the extinguishment of the old contract, and the validity of the new one. Unless the old debt is extinguished the new agreement is without consideration. The creation of the new obligation and the extinguishment of the old take place at the same time. *Clark v. Billings*, 59 Ind. 508; *Morrison v. Kendall*, 6 Ind. App. 212; *Kelso v. Fleming*, 104 Ind. 180; *Horn v. McKinney*, 5 Ind. App. 348; *Parsons v. Tillman*, 95 Ind. 452; *McClellan v. Robe*, 93 Ind. 298; *Davis v. Hardy*, 76 Ind. 272; *Bristol, etc., Co. v. Probasko*, 64 Ind. 406.

In the case at bar there is a failure of proof that there was a meeting of the three minds upon the proposition that the old debt should become the obligation of a new debtor. There is no evidence to show, either that there was a mutual agreement among all the parties to substitute a new debtor for the old debtor, or that there was an extinguishment of the old debt. The motion for a new trial should have been sustained. Judgment reversed.

CENTER SCHOOL TOWNSHIP v. STATE, EX REL. SCHOOL
CITY OF WEST INDIANAPOLIS ET AL.

[No. 2,485. Filed May 25, 1898.]

APPEAL AND ERROR.—*Presumptions*.—All reasonable presumptions will be indulged in favor of the rulings of the trial court, and before an appealing party is entitled to the reversal of the judgment appealed from he must show that there was reversible error below. *p. 313.*

SAME.—*Review of Pleadings*.—*Record*.—The Appellate Court cannot review the ruling of the trial court on a demurrer to a pleading unless such pleading and demurrer are brought into the record as prescribed by law. *p. 314.*

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From the Marion Superior Court. *Appeal dismissed.*
T. S. Rollins and Thomas Hanna, for appellant.
Elmer E. Stevenson, for appellee.

WILEY, J.—The only error complained of by the appellant in its assignment of errors is the action of the court below in overruling the demurrer to the several paragraphs of the amended complaint. As the record comes to us, the assignment of errors does not present any question for decision. It is the established practice, and a wholesome rule, that all reasonable presumptions will be indulged, on appeal, in favor of the rulings of the trial court, and before the appealing party is entitled to a reversal of the judgment, he must show that there was reversible error below. A party seeking a reversal of a judgment must bring to the appellate tribunal a perfect record. *Collins v. U. S. Express Co.*, 27 Ind. 11; *Fellenzer v. Van Valzah*, 95 Ind. 128; *Morningstar v. Musser*, 129 Ind. 470; *Bozeman v. Cale*, 139 Ind. 190. This is necessary so that the court may look to the entire record to determine if reversible error has intervened.

We are asked to declare whether or not the court below committed error in overruling the separate demurrer to the several paragraphs of the amended complaint, and yet the record does not contain the complaint. The record shows the following order book entry: "Come now the plaintiffs by counsel and by permission of the court first had, file an amended first, second, third, and fourth paragraphs of complaint, and an additional fifth paragraph of complaint, and the defendants are ruled to answer thereto. Said amended complaint is in the words and figures following, that is to say:" Immediately following this entry is a pencil memorandum as follows: "Not on file." The transcript of the clerk certifies: "That

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the foregoing transcript contains full, true and complete copies of all the entries of proceedings had, and also of all the papers filed in cause numbered 50354 (except the complaint missing and the motion for a new trial omitted)," etc. It is apparent that an appellate court cannot review the ruling of a trial court on a demurrer to a pleading unless such pleading and the demurrer are brought before it, in the manner prescribed by law. See *Aydelott v. Collings*, 144 Ind. 602; *Riley v. State*, 148 Ind. 48.

"The party who asserts that a ruling upon a pleading was erroneous must affirmatively show his assertion to be correct, otherwise the presumption that the court rules correctly upon the pleadings will prevail against him." Elliott's App. Proc., section 720. In the absence of a recital or a statement in the record to the contrary, the presumption is that the judgment is within the issues and supported by the appropriate proceedings. Elliott's App. Proc., section 719. *Jones v. Collins*, 80 Ala. 108; *Citizens' Bank v. Bolen*, 121 Ind. 301; *Buecher v. Casteen*, 41 Kan. 141, 21 Pac. 112; *Rundell v. Kalbfus*, 125 Pa. St. 123; *Calder v. Smalley*, 66 Ia. 219, 23 N. W. 638.

Before the appellate court can determine the sufficiency of a pleading, such pleading must be brought before it for review in the manner prescribed by law and the rules of practice. An appealing party might as well ask a court of last resort to pass upon the ruling of a trial court in admitting or rejecting offered evidence, without bringing the evidence into the record, as to ask it to review the ruling on a demurrer to a pleading in the absence of such pleading.

There are a number of affidavits on file and with the record, to the effect that the amended complaint is not on file in the court below, and has been lost, but this does not aid the record, neither can we consider

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them. Upon proper application to the trial court, the amended complaint might have been substituted and then brought into the record by a writ of *certiorari*, but this has not been done, and so far as the record shows, no effort has been made in that direction. The record, being barren of any question subject to review under the assignment of errors, the appeal must be dismissed. Appeal dismissed.

KENNEDY v. THE CLEVELAND, CINCINNATI, CHICAGO
AND ST. LOUIS RAILWAY COMPANY.

[No. 2,514. Filed May 25, 1898.]

RAILROADS.—*Damages for Lands Taken for Right of Way.—Complaint.*—A complaint in an action against a railroad company for the recovery of damages for lands taken for right of way without assessment of damages therefor as provided by statute, sections 905, 906, 909, R. S. 1881, is not bad for failing to aver any negotiation or attempt at an agreement between the parties before the beginning of the action.

From the Madison Circuit Court. *Reversed.*

Ed. F. Daily and *Bagot*, *Ellison & Bagot*, for appellant.

C. E. Cowgill, *J. W. Lovett* and *F. E. Holloway*, for appellee.

HENLEY, C. J.—At the time of the construction of the Cincinnati, Wabash & Michigan, Railway, and at the time this action was commenced, the appellant, then a minor, was the owner of a certain tract of land in Madison county, Indiana. The corporation owning and constructing said road entered upon appellant's real estate and appropriated a portion of it for the right of way of its said railroad and constructed its said railroad upon and over that portion of appellant's real estate so appropriated. The entry and appropriation being without any legal proceedings there-

for. After the construction of the railroad by the Cincinnati, Wabash & Michigan Railway Company as aforesaid, and before this action was commenced, said company sold all of its property and effects to this appellee. Upon appellant becoming of age she instituted this action under sections 905, 906, 909, R. S. 1881, for the purpose of securing from appellee some compensation for her land taken and held by it. The lower court sustained appellee's demurrer to the amended complaint. The sufficiency of the complaint is the only question before this court. The complaint is short, and is, omitting the formal parts, in the following words: "Nora E. Kennedy, plaintiff, complains of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, defendant, and says that the plaintiff is now, and for the last ten years has been the owner of certain real estate in the county of Madison and State of Indiana; that heretofore the Cincinnati, Wabash & Michigan Railroad Company, a corporation owning and operating a railroad in and through said Madison county, entered upon plaintiff's said real estate and located and fixed a line of its railroad then known as the Cincinnati, Wabash & Michigan Railroad, through across and upon plaintiff's said land, and took and appropriated for said road the following part of said real estate, to wit: Beginning at a point 389 feet west of the center of section 3, township 17 north, range 8 east, in Madison county and State of Indiana, and running thence north, 21 degrees 40 minutes west, 811 feet; thence south 289 feet, thence south, 21 degrees 40 minutes east, 506 feet, thence east 68 feet to the place of beginning. Which real estate is and was at the time it was taken and appropriated by the said Cincinnati, Wabash & Michigan Railroad Company of the value of \$300.00, in which amount the plaintiff has been damaged by the appropriation thereof. That

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after said Cincinnati, Wabash & Michigan Railroad Company so took and appropriated said real estate for the purpose aforesaid, it built and constructed a railroad track over and upon the same, and ever since then said Cincinnati, Wabash & Michigan Railroad Company and the defendant, its successor, has been running their cars thereover. That after the Cincinnati, Wabash & Michigan Railroad Company so took and appropriated said real estate and so built and constructed said railroad over same, as aforesaid, it sold and transferred its said railroad and right of way, including the said real estate, to the defendant; and the said defendant then and there succeeded to all rights of said Cincinnati, Wabash & Michigan Railroad Company, and then and there took possession of the railroad and said real estate, and has been ever since operating its trains and cars over said railroad and over said real estate, during all of which time the plaintiff was a minor under the age of twenty-one years, by reason of which the plaintiff has been deprived of the use and possession of said described real estate, and has been damaged in the sum of \$300.00; that neither of said railroad companies paid or tendered to this plaintiff, or any one else for her, any amount whatever for said real estate, although she and her guardian both demanded payment therefor of both of said companies before the bringing of this proceeding. Wherefore, plaintiff prays the court that a writ of assessment of damages may issue herein, and that she have judgment for the amount of damages assessed. The law under which this application is made is sections 905, 906, 909, of Revised Statutes of 1881."

It is contended by counsel for appellee that this complaint is bad for the reason that it does not aver any negotiation or attempt at an agreement between the parties before beginning the action; that the aver-

ment that the parties had attempted and failed to agree was a condition precedent to the plaintiff's right of instituting these proceedings, and its absence from the complaint rendered it insufficient.

Sections 905, 906, 909, R. S. 1881, are as follows: Section 905. "When any person, corporation, or company design to construct a canal, or railroad, or turnpike, graded, macadamized, or plank road, or bridge, or establish a ferry, as a work of public utility, although for private profit, being authorized by law to take real property therefor, such person, corporation, or company may have a writ of assessment of damages." Section 906. "Such person, corporation, or company may file an application for a writ in the circuit court, or, in vacation, in the office of the clerk thereof, setting forth the precise description of the real estate desired to be taken, the names of the persons interested therein, making them defendants, and the purposes to which the same is to be converted, and refer to the law which authorizes the taking of the property. The clerk shall thereupon issue to the sheriff a writ of assessment of damages, reciting therein the material part of the application, and direct the sheriff to assess the damages by a jury." Section 909. "Any person having any interest in any land which has been or may be taken for any such public work may have the benefit of this writ upon his own application, made as above provided, upon which like proceedings shall be had as in case of applications made by the corporation, company, or person prosecuting the work."

We do not believe that it is necessary that the complaint contain any such allegation as appellee contends it should, when, as in this case, the property had already been taken by the company, and the time for negotiations as directed in section 3907, R. S. 1881, had passed. The case of *Lake Shore, etc., R. W. Co. v.*

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Cincinnati, etc., R. W. Co., 116 Ind. 578, is not in point here. This case is controlled by an entirely different statute from the one in the case cited, and by a statute which is not applicable and could not be made to cover a case where damages are asked or a writ of assessment demanded, on account of one railway crossing the right of way of another railway.

The complaint in the case at bar contained all the material allegations contemplated by the statute in cases of its kind. It averred the taking of appellant's property, a precise description of the property taken; that the property taken was the property of appellant at the time it was so taken, and at the time of the commencement of this action; that the action was prosecuted under certain statutes, referring to them, and was brought against the company in possession. The lower court erred in sustaining the demurrer to the appellant's application, for which reason the cause is reversed, with instructions to the lower court to overrule the demurrer to the complaint or application of the appellant herein.

TRUSTEES OF THE CHRISTIAN CHURCH OF BLUFFTON,
INDIANA, v. SHOEMAKER'S ESTATE.

[No. 2,525. Filed May 25, 1898.]

SPECIAL FINDING.—Sufficiency.—A special finding must find the facts and not mere matters of evidence. p. 321.

SAME.—Venire De Novo.—Where a special finding is defective in failing to find the material facts in issue the proper remedy is a motion for a *venire de novo*. pp. 321, 322.

From the Wells Circuit Court. *Reversed.*

Levi Mock, John Mock and George Mock, for appellant.

Joseph S. Dailey, Abram Simmons and Frank C. Dailey, for appellee.

COMSTOCK, J.—This is an action by the appellants against the estate of John Shoemaker, deceased, tried in the court below upon a complaint to recover \$190.00, in which amount, it is alleged, said estate is indebted to plaintiffs “for money had and received by said decedent for the plaintiffs,” which money, it is alleged, was “received by said decedent as the trust fund of plaintiffs as trustees of said church.” The cause was submitted to the court, and upon proper request, a special finding of facts was made and conclusions of law stated thereon, and judgment rendered in favor of appellee for costs.

Various errors are assigned, but we deem it only necessary to pass upon the second assignment, viz: That the court erred in overruling appellants’ motion for a *venire de novo*. The reasons set out in the motion are, “(1) The special finding of the court is so defective, uncertain, and ambiguous that no judgment can be rendered thereon; (2) the said special findings do not assess plaintiff’s damages; (3) they contain the evidence, and not the facts established by the evidence; (4) they do not state whether or not the defendant is indebted to the plaintiffs.”

We set out the thirteenth, fourteenth, fifteenth, sixteenth, and seventeenth findings, viz: (13) “That on the 3rd day of October, 1888, John S. Shoemaker, John W. Wandel and John Albertson, under the name of ‘Trustees of the Christian Church of Bluffton, Wells County, Indiana,’ conveyed by warranty deed to Abram Mast, *et al.*, and their successors in office, of the Reformed Church in Bluffton, Wells county, Indiana, for the sum of \$900, a part of their real estate situate in Bluffton, Wells county, Indiana. (14) That the grantee, as a part consideration, assumed the payment of the mortgage thereon, in favor of John Stude-

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baker, amounting to the sum of \$477.07; that two notes were executed for the residue of said purchase money, which notes were afterwards paid to John Albertson, treasurer of said church organization. (15) That in the year 1884, John Shoemaker had become indebted to John Albertson in the sum of \$50.00, and in the year 1890 or 1891 said John Shoemaker directed the said John Albertson to take from said fund so received by said Albertson, as treasurer of said church organization, and pay him, the said Albertson, said indebtedness, which the said Albertson did. (16) That on different occasions from 1888 up to December, 1896, the said John Shoemaker told the said John Albertson that he, the said John Shoemaker, had \$190.00 of the money of said church organization in his hands, and was ready to turn the same over to said church organization whenever the same was needed by said church organization. (17) That no demand was ever made on the said John Shoemaker for said money; that said John Shoemaker never paid said money mentioned in finding No. . . . , nor any part thereof, nor ever accounted for the same in any way." These are the only findings in reference to, or in any way calculated to throw light upon the question of the alleged indebtedness of the said Shoemaker during his lifetime to appellants.

The sixteenth finding is clearly of evidentiary and not ultimate facts. It is well settled that a special finding like a special verdict, must find the facts and not mere matters of evidence. *State, ex rel. v. Griffin*, 16 Ind. App. 555; *Perkins v. Hayward*, 124 Ind. 450, and the authorities there cited. The court does not find that the decedent was or was not indebted to appellants. The special findings are clearly defective, under the issues, and in moving for a *venire de novo*, ap-

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pellants asked for the proper remedy. *Ferris v. Udell*, 139 Ind. 593, and authorities there cited.

The case is not one where the special finding is silent as to one or more material facts in issue, in which case it is presumed that the issuable facts upon which the finding is silent are not proved, but is one in which the findings are defective. We express no opinion as to the conclusions of law. Judgment reversed, with instructions to sustain the motion for a *venire de novo*.

CLARK SCHOOL TOWNSHIP v. GROSSIUS ET AL.

[No. 2,581. Filed May 25, 1898.]

TOWNSHIP TRUSTEES.—*School Supplies*.—Sections 8081, 8082, Burns' R. S. 1894, providing that before a township trustee can contract a debt in excess of the fund on hand to which the debt is chargeable he shall obtain an order from the board of county commissioners, etc., is not applicable to a debt incurred for stoves used in the schoolhouses of the township.

From the Perry Circuit Court. *Affirmed*.

Sol. H. Esarey and *F. S. Rollins*, for appellant.

William Henning and *Edwin C. Henning*, for appellees.

COMSTOCK, J.—Appellees, plaintiffs below, brought this suit against the appellant on two warrants issued by the trustee of the township, payable to appellees, one for \$70.00 and the other for \$33.00, for five coal stoves for use in the schoolhouses in the district. The complaint alleges that such stoves were suitable and necessary for the use of the schools in the township; that they were delivered, ordered and retained by the township, and were worth the price, and have been in continual use since November 18, 1893, the date of the sale.

Appellant answered in two paragraphs. The first

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being a general denial. The second alleged, in substance, that at the time of the purchase of the stoves, the fund on which said orders were drawn and the said school township were in debt beyond the amount of money on hand, and that to be derived from the tax levy for the current year; that the township trustee did not post any notices in his township setting forth that he would apply to the board of commissioners of said county, asking permission to incur said debt; that he never asked the said board for permission, nor did he ever get any permission from said board to make said debt, and that said debt was incurred in violation of the law of the State. To this paragraph of answer, appellee demurred for want of sufficient facts. The court sustained the demurrer, to which ruling appellant excepted. A trial resulted in a judgment in favor of the appellees.

The only error assigned is the action of the court in sustaining appellee's demurrer to the second paragraph of answer. This paragraph sets out, as a defense to the action, the violation of sections 8081, 8082, Burns' R. S. 1894 (6006, 6007, Horner's R. S. 1897).

We do not deem it necessary to review the numerous decisions of this and the Supreme Court upon the authority of a township trustee. It is the settled law of this State that a township trustee has no power to bind his township by contracting a debt in excess of the fund on hand to which the debt is chargeable and of the fund to be derived from the tax assessed against his township for the year for which such debt is to be incurred, without first obtaining an order from the board of county commissioners as provided in said sections 6006 and 6007.

Boyd v. Black School Tp., 123 Ind. 1, was an action in which the township trustee, in behalf of the township, had executed a promissory note, whereby the

school township promised to pay to the plaintiffs a specified amount for school furniture therein described. The evidence disclosed that the township trustee contracted the debt mentioned in the complaint in violation of sections 6006 and 6007. Mitchell, J., speaking for the court, said: "In a case like the present, where it fairly appears that the contract was invalid for want of a compliance with the statute, the right to recover does not rest upon the contract but upon the fact that the township received and enjoyed the benefit of the property suitable and necessary for the use of schools." In *Miller, Admr., v. White River School Tp.*, 101 Ind. 510, the precise question before us was passed upon. The township trustee had issued the certificate of indebtedness upon which the action was brought for tellurians for the use of the township, and the court held that such certificate or note was not invalid because of the trustee's failure to comply with the provisions of said sections 6006 and 6007 of the statute.

The fourth paragraph of answer set up the same defense pleaded in the paragraph of answer under consideration. The court, speaking by Howk, J., used the following language: "We are of the opinion, however, that the fourth paragraph of answer stated no defense whatever to the appellants' action. It is manifest that the paragraph was prepared upon the supposition of the pleader that the contract for the tellurians, mentioned in the complaint, was void because the appellee's trustee had not complied with the provisions of sections 6006 and 6007, R. S. 1881, before making such contract. We think, however, that these sections of the statute can have no application to the ordinary debts incurred by the trustee for furniture, apparatus and other supplies for the schools of his township, such as the debt in suit for the tellurians."

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This case is cited in numerous decisions and upon this point is not criticised or overruled. Stoves are necessary articles of furniture of a school room.

We think that it was not the purpose of the legislature to require the township trustee when one is needed, to petition and procure an order from the board of county commissioners, authorizing him to contract the debt, and to give the twenty days' notice of his application for such authority to said board. The debt in controversy was an ordinary one incident and necessary to the conduct of the schools to which as was said by Howk, J., *supra*, said sections 6006 and 6007 do not apply. Judgment affirmed.

UNION SAVINGS BANK AND TRUST COMPANY ET AL.
v. INDIANAPOLIS LOUNGE COMPANY.

[No. 2,123. Filed Oct. 8, 1897. Rehearing denied May 25, 1898.]

TRUSTS.—*Competency of Trustee.*—*Presumption.*—*Conflict of Laws.*—The courts of this State will presume that a corporation appointed in another state as a co-trustee in an assignment for the benefit of creditors was competent to act. *p.* 327.

BANKS AND BANKING.—*General Deposits.*—A bank and a general depositor stand in the relation of debtor and creditor, and a general assignment for the benefit of creditors by such depositor does not transfer to his assignee the possession of the identical money deposited. *p.* 328.

ATTACHMENT.—*Bank Deposit.*—*Assignment for Benefit of Creditors.*—A general assignment for the benefit of creditors by a resident of another state, according to the law of such state, passes to the assignee title to a general deposit of money in a bank in this State, and such deposit cannot be attached by a creditor of assignor in this State. *pp.* 328-333.

From the Marion Superior Court. *Reversed.*

Claypool & Claypool, for appellants.

T. S. Rollins, for appellee.

ROBINSON, J.—Appellee brought suit in attachment and garnishment. The Indiana State Bank answered

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as garnishee that it had in its custody the sum of \$329.40 belonging to appellant Commercial Bank of Cincinnati, Ohio. William H. Campbell, trustee, and the Union Savings Bank and Trust Company of Cincinnati, Ohio, assignee and trustee of said Commercial Bank, asked leave to be made parties defendant and to answer the complaint, which was granted. This answer was held insufficient against a demurrer, and this ruling is the only question presented. The answer alleges in substance, that on the 27th day of March, 1895, the Commercial Bank of Cincinnati, Ohio, made a general assignment of all its lands, tenements, hereditaments, and appurtenances, goods, chattels, stocks, promissory notes, debts, choses in action, evidences of debt, claims, demands, property and effects of any and every description, belonging to said bank, wherever the same may be situated, "except property exempted by law," to William H. Campbell, in trust for the benefit of all its creditors, said assignment being under and pursuant to the laws of the state of Ohio, and for the benefit of all its creditors; that said trust was duly accepted in writing; that said deed of assignment was duly executed and filed for record on said date; that on the 28th day of March, 1895, said Campbell appeared, and gave bond, and entered upon his duties as such assignee and took possession of all the books, notes and other evidences of indebtedness, and of all the real and personal property assigned to him under said deed of assignment, and has continued ever since said date of March 28, 1895, in actual possession and control of said books, notes and other evidences of indebtedness and property belonging to said bank, except since the 6th day of April, 1895, he has held said possession in connection with the Union Savings Bank and Trust Company of Cincinnati, a co-trustee, duly appointed by said court,

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with said Campbell, to carry out and discharge the terms of said trust; that said Campbell and said savings bank were at and prior to the filing of this action the owners, and as assignees, in possession of said sum of \$329.40 which was held in trust for them by the State Bank of Indiana and are entitled to continue to hold possession and control thereof. The law of Ohio relating to assignments, is embodied in the answer. The deed of assignment was acknowledged and filed for record on the day of its date, March 27, 1895, before a notary public of Hamilton county, Ohio, and on the same date the trustee accepted the trust. This suit was brought on the 29th day of March, 1895.

Counsel for appellee argue that the name "Union Savings Bank and Trust Company" imports a corporation, and that as a corporation, at common law, could not act as trustee, the answer should have pleaded the Ohio statute on that subject. While the name may import a corporation, yet we must presume that the company, having been appointed a co-trustee by the Ohio court, was competent to act as such co-trustee.

It is argued that as the pleading shows that the deed of assignment excepts such property as is by law exempt, it should negative the presumption that the property garnisheed is exempt. If the deed of assignment undertook to exempt certain property and failed, we cannot see upon what ground any one except the assignor could complain. If no property was excepted by the assignor, the creditors certainly could not complain.

It is further argued that the answer fails to show that the assignee had possession of the money in controversy prior to the bringing of the attachment and garnishment proceedings. It appears from the answer that the assignment was perfected in accordance

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with the provisions of the Ohio law governing general assignments for the benefit of creditors, and that the assignee had taken possession of the property assigned.

As it does not appear that the money in the Indiana State Bank belonging to the Ohio bank was a special deposit, it follows that there could have been no transfer of the possession of the identical money. The Ohio bank and the Indiana bank, prior to the assignment, stood in the relation of creditor and debtor. The Ohio bank had no claim on the particular money, but had a claim on the Indiana bank for a like amount of money. *McLain v. Wallace*, 103 Ind. 562; *Fletcher v. Sharpe*, 108 Ind. 276; *Harrison v. Wright*, 100 Ind. 515, 50 Am. Rep. 805; *Hamilton v. Toner*, 17 Ind. App. 389.

Considering the relation existing between the Ohio bank and the Indiana bank as that of creditor and debtor, the question presented by the case at bar is whether a voluntary assignment for the benefit of all creditors of a debt due from the Indiana bank to the assignor living in Ohio, in which state the assignment is made, passes the debt so as to defeat a subsequent attaching creditor of the assignor in Indiana, who, subsequent to the assignment, garnishees the Indiana bank. The statute in this State providing for assignments requires that the deed of assignment shall, within ten days after its execution, be filed with the recorder of the county in which the assignor resides, whose duty it shall be to record the same as deeds are recorded, and that no assignment shall convey to the assignee any interest in the property so assigned until such assignment is recorded as the act provides. There is no provision in the statute concerning the steps to be taken by the assignee, under a foreign assignment, of a nonresident assignor who assigns property situated in this State. A deed of assignment conveying

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real estate would probably be governed by our registry laws in so far as having the deed recorded. But, in so far as personal property is concerned, the law of this State gives no directions. It has been held by our courts that a foreign assignment does not vest the title to a stock of goods situated in this State in the assignee until the assignee has taken actual possession. *Woolson v. Pipher*, 100 Ind. 306. But in the case at bar, the only tangible thing the possession of which the Ohio bank could transfer to the trustee was some evidence of the debt owing the assignor by the Indiana bank. To the final taking possession by the assignee no stricter rule applies than in case of ordinary purchase. *Sullivan v. Smith*, 15 Neb. 476, 19 N. W. 620. The thing assigned was a chose in action, and could have no *situs* other than that of the Ohio bank. It cannot be said that it had any actual *situs* in Indiana. If a tender should have been required, it must have been made to the Ohio bank, and if the validity of the transfer by the assignor to the assignee should be questioned, it must be determined by the Ohio law. *United States v. Bank of U. S.*, 8 Rob. (La.) 401; *Burrell Assignments* (6th ed.), section 282; *Story Confl. Laws*, section 383, *et seq.*

The assignment, when perfected under the Ohio statute, was simply a voluntary conveyance and could have no greater effect than any other conveyance so far as passing title to the property assigned is concerned. As the assignment under the Ohio law was complete, it passed the title to all the assignor's property to the assignee located in Ohio, and also all property located in Indiana, unless some statute in the latter State prevented it. And as there is no Indiana statute prescribing the duties of a foreign assignee to whom has been assigned personal property in this State, the assignment, valid by the laws of Ohio, upon the princi-

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ples of public policy and judicial comity, passed the title to the property in question by the assignment before the inception of the attachment and garnishment. This rule would not apply, as we have seen, where the property located in this State was tangible property, capable of actual possession, but in this case the deed of assignment carries choses in action and evidences of debt whose actual *situs* was at the domicile of the assignor and the possession of which was transferred to the assignee before the attachment proceedings were begun. It cannot be said that such a holding is denying the right of a vigilant creditor to collect his debt. The assignor had put his property in the hands of a court to be distributed through the assignee to all his creditors, and courts will be liberal in protecting the equal rights of all creditors.

In *Caskie v. Webster*, 2 Wall. Jr. 131, the court, by Grier, J., said: "A debt is a mere incorporeal right. It has no *situs*, and follows the person of the creditor. A voluntary assignment of it by the creditor, which is valid by the law of his domicile, whether such assignment be called legal or equitable, will operate as a transfer of the debt which should be regarded in all places." In *Wilson v. Carson*, 12 Md. 54, an assignment for the benefit of creditors made in Kentucky, which was not against the policy of the Maryland laws, although not recorded in Maryland as required in case of Maryland assignments, was upheld as against a subsequent attachment by a Maryland creditor. In *Gregg v. Sloan*, 76 Va. 497, an assignment made in North Carolina, including a debt and mortgage in Virginia, although not recorded in Virginia, was held good as against a subsequent Virginia attachment. In *Princeton Mfg. Co. v. White*, 68 Ga. 96, a voluntary assignment in New York, not repugnant to Georgia laws, although the assignment contained

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preferences, was held valid in Georgia as against a subsequent garnishment by Georgia creditors. In *Frazier v. Fredricks*, 24 N. J. L. 162, a voluntary assignment for creditors valid in the state where made, and which did not contravene the statutes or policy of the laws of New Jersey, was upheld against an attachment by a New Jersey creditor. In *Askew v. La Cygne Exch. Bank*, 83 Mo. 366, 53 Am. Rep. 590, a voluntary assignment for creditors made in Kansas, was held to pass personal property in Missouri as against a subsequent attachment by a Missouri creditor. In *Zuppann v. Bauer*, 17 Mo. App. 678, an assignment made in another state was upheld in Missouri as against the subsequent attachment of a debt in that state. In *Van Wyck v. Read*, 43 Fed. 716, an assignment for the benefit of creditors in New York by one citizen of that state to another, which was valid in that state, was held to transfer to the assignee the title to a note and mortgage to secure it on land in Florida, so as to defeat a subsequent attachment by Florida creditors.

It is argued that notice of the assignment had not been given to the Indiana bank prior to the attachment proceedings, but we are not informed how notice to the debtor of the assignor could affect the rights of the attaching creditor. "The object of giving notice of the assignment," says Burrill in his work on Assignments (section 338), "is to give publicity to the transaction for a two fold purpose—to apprise the creditors of the transfer and to instruct them as to their proceedings to obtain its benefit; and to inform the debtors of the assignor and persons having moneys or property belonging to him in their hands to whom they are to account and to pay and deliver the same."

In *Guillander v. Howell*, 35 N. Y. 657, Peckham, J., said: "A chose in action cannot surely be said to have any actual *situs* in the place where the debtor resides

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—as a general principle, it is payable at the residence of the creditor, if not expressed otherwise, and a tender to be good must be made to the creditor. There would seem, therefore, to be no sound basis for the debtor's state, to legislate exclusively as to the legality of a transfer of that debt, made by a foreign creditor. In such case, as in all others, where the property transferred does not actually lie within the jurisdiction of another government, a sale or a contract, valid where made, is valid everywhere." See *Mowry v. Crocker*, 6 Wis. 326; *Smith v. Chicago, etc., R. W. Co.*, 23 Wis. 267; *Warner v. Jaffray*, 96 N. Y. 248; *Walters v. Whitlock*, 9 Fla. 86, 76 Am. Dec. 607; *Burrill's Assignments*, sections 242, 340; *Princeton Mfg. Co. v. White*, 68 Ga. 96.

As we have seen, the assignment was made according to the Ohio law, and was valid and binding in that state. There is nothing in the deed of assignment repugnant to the laws of this State such as would make it illegal were it intended to be enforced here. It was a general assignment for the benefit of all the creditors of the assignor, and our law recognizes the right of a debtor, in insolvent circumstances, to make an assignment of all his property to an assignee in trust for the benefit of all his creditors.

We think the deed of assignment was broad enough to carry the chose in action in controversy in this suit. The only possession of the debt owing to the Ohio bank by the Indiana bank that could be given was by delivering the evidence of the debt. The assignee had taken possession before the attachment proceedings were begun. The interest of the assignor had been divested, and when the attachment issued, there was nothing for it to reach. The beneficial interest was at that time vested in the assignee. From

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what we have said it follows that the demurrer to the answer should have been overruled. Judgment reversed.

HANOVER FIRE INSURANCE COMPANY v. DOLE.

[No. 2,478. Filed June 7, 1898.]

INSURANCE.—Application.—Where an applicant for insurance on the 24th day of August, 1895, stated in his application that he had taken an inventory of stock in March, 1895, and agreed therein to take an inventory once a year during the life of the policy, he was not thereby required to take an inventory in March, 1896, but had one year from the date of the policy in which to make such inventory. pp. 334-336.

SAME.—Construction of Policy.—Forfeitures.—Warranties.—In contracts of insurance all doubtful or ambiguous clauses will be construed with a view to prevent a forfeiture of the policy, and where a clause is capable of two constructions, one of which would work a forfeiture, and the other prevent a forfeiture, the court will adopt that construction which will prevent a forfeiture, and not a construction which imposes upon the assured the obligation of a warranty. pp. 336, 337.

SAME.—Promissory Warranties.—An agreement in an application for insurance to take an inventory of stock, and keep accounts of purchases and sales in an iron safe is a promissory warranty, and a failure to observe such agreement renders the policy voidable; if the company knows that such agreement is not being complied with, and takes no steps to forfeit the policy, it will not be heard, after a loss, to say that by reason of the failure to observe the agreement that the policy is void. p. 338.

SAME.—Limitation of Power of Agents.—Waiver.—A clause in a policy of insurance providing that no officer or agent of the company shall have any power to waive any provision or condition in the policy unless such waiver is in writing and attached thereto, may be itself waived by the insurer, either by express agreement or by the conduct of the company. pp. 338, 339.

From the Whitley Circuit Court. *Affirmed.*

Thomas Bates, I. W. Leonard and D. V. White-leather, for appellant.

Thomas R. Marshall, Wm. F. McNagney and P. H. Clugston, for appellee.

ROBINSON, J.—The questions presented by this appeal arise upon the pleadings.

The second paragraph of complaint avers: That on the 24th day of August, 1895, appellant for a named premium, insured appellee's property for one year against loss by fire in the sum of \$2,300.00, \$600.00 of which was on a building, \$200.00 on store, furniture and fixtures, and \$1,500.00 on a stock of general merchandise; that the policy stipulated that the assured "shall take an inventory of the stock hereby covered at least once a year during the life of this policy, and shall keep books of account, correctly detailing purchases and sales of said stock, and shall keep said inventory and books securely locked in an iron safe during the hours that said store is closed for business. Failure to observe these conditions shall work a forfeiture of all claims under this policy. Reference is made to his application, which is made a part of this policy." (A copy of the policy is made part of the complaint.) That \$100.00 additional insurance was afterwards granted on the store room front, expiring with the policy; that appellee complied in all particulars with the terms of said policy; that on August 3, 1896, without appellee's fault, said property was totally destroyed by fire; that on the 12th day of August, 1896, appellee made proof of loss as required by the policy; that appellant refused to pay said loss on the ground that appellee had forfeited his policy by failing to keep an inventory, and books of accounts of his stock locked in an iron safe, but it is averred that appellee had one year to make said inventory and keep the same in such safe; that he is ready and willing to prove that such valuations are correct.

The third paragraph of complaint contains additional averments, to the effect that appellee com-

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plied in all particulars with the terms of said policy, except that he failed to put in an iron safe an inventory of the stock of goods which he had made, and an account of his daily sales and purchases, which he likewise kept; that said iron safe at the date of said policy was a small and an old safe, and after said policy was issued, he sold said safe and purchased a new one for the use of the post-office, and which was not to be used for any other purpose; that shortly prior to said loss, appellee explained to one Campbell, agent of appellant, and who had issued said policy, that he had sold his old safe and was not putting his books of accounts of purchases and sales in said new safe, nor had he put the inventory therein; and that said Campbell said he was satisfied with the condition of said stock, and that it was all right for him not to put said inventory and books in said safe.

Demurrers were overruled to these paragraphs and an answer in seven paragraphs filed, the first of which (the general denial), was afterwards withdrawn. A demurrer to each paragraph of answer was sustained, and appellant refusing to plead further, judgment was rendered in appellee's favor for \$2,472. The overruling of the demurrers to the complaint, and sustaining the demurrers to the answer are the errors assigned.

Counsel for appellant have not discussed the rulings on the demurrers to the fifth, sixth, and seventh paragraphs of answer, and the questions raised by the fourth paragraph of answer are the same as those presented by the demurrer to the third paragraph of complaint.

The second paragraph of answer admits the execution of the policy, and the loss by fire, and avers that by appellee's written application for insurance, made a part of the paragraph, he warranted the truthful-

ness of all the facts contained therein; that in said application, appellee stated he had taken an inventory of his stock of goods in March, 1895, and that he made an inventory annually. The stipulation about the inventory and books of account, etc., as stated in the complaint, is then set out, and it is averred that appellee, in his application, agreed and warranted that he would take an account of his stock in March, 1896; that appellee did not keep such books of account, did not take an inventory in March, 1896, and did not keep such inventories and books of account in an iron safe, as in his application he had agreed to do.

The breach of the contract pleaded in the third paragraph of answer is failure to place such books and inventories in such safe; that the warranty covered both the inventory made in March, 1895, and the inventory agreed to be made in March, 1896, and that none of said conditions were ever waived by appellant.

In appellee's application for insurance, filed as an exhibit with the second paragraph of answer, he stated that the inventory of the stock was taken annually, and that the last inventory was taken in March, 1895. The assured had agreed to take an inventory of the stock at least once each year during the life of the policy. It cannot be said that he then agreed to take an inventory in March, 1896, and under the ruling in *Citizens Insurance Co. v. Sprague*, 8 Ind. App. 275, the assured had one year from and after the date of the policy in which to make such inventory. It is well settled that in contracts of insurance, all doubtful or ambiguous clauses will be construed with a view to prevent a forfeiture of the policy, and that where a clause is capable of two constructions one of which would work, and the other prevent a forfeiture, it is the province of the court to adopt that construction which will prevent a forfeiture, and not a con-

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struction which imposes upon the assured the obligation of a warranty. *Indiana, etc., Ins. Co. v. Byrnett*, 9 Ind. App. 443; *Union Cent. Life Ins. Co. v. Pauly*, 8 Ind. App. 85; *Indiana, etc., Ins. Co. v. Rundell*, 7 Ind. App. 426; *Northwestern, etc., Ins. Co. v. Hazelett*, 105 Ind. 212, 55 Am. Rep. 192; *Moulor v. American, etc., Ins. Co.*, 111 U. S. 335; *Schmidt v. German Mut. Ins. Co.*, 4 Ind. App. 340.

Construing the policy that appellee had one year from the date thereof to file an inventory, the question arises as to when the keeping the books of accounts of purchases and sales should begin. So far as the pleadings show, the only inventory ever made was in March, 1895. The policy was issued in August, 1895. The only value, so far as the policy is concerned, such books of accounts could have, would be to show the current increase and diminution of the stock, and it was evidently intended that this should begin with an inventory. The true meaning of the clause in question is that when, by the terms of the application and policy, an inventory was made of the stock, books of accounts of purchases and sales, should be kept, so that, by a reference to the inventory and such purchases and sales at any time, the amount of stock on hand could be ascertained. This was the only purpose of this provision in the policy. The requirement that an inventory should be taken, and an account of purchases and sales should be kept, are not provisions independent of each other, but are to be construed together. The policy was for a single year, and appellee had until the expiration of that year to make the inventory. He was not required to make an inventory immediately upon receipt of the policy, and was required to keep books of accounts of purchases and sales only from the time of making the in-

ventory. *Forchand v. Niagara Ins. Co.*, 58 Ill. App. 161. See *Citizens Ins. Co. v. Sprague*, *supra*.

Even if it were conceded that there was a failure on the part of the assured to comply with the terms of the policy in the manner above stated, yet we must hold that the pleadings show a waiver of the conditions concerning the keeping of the books of accounts of purchases and sales in a safe. The agreement to keep the books of accounts was a promissory warranty. Wood on Insurance, 422. It was in the policy for the benefit of the insurer. A failure to observe it rendered the policy voidable. If the company, in such case, knows that such a condition is not being complied with, but takes no steps to forfeit the policy, it will not be heard, after a loss, to say that by reason of the failure to observe the condition the policy is void. Thus in *Havens v. Home Ins. Co.*, 111 Ind. 90, the court, by Mitchell, J., said: "It is abundantly settled that, notwithstanding conditions in the policy, if at the time the insurance was effected, or afterwards, there were conditions, uses, or incidents of the risk which were in conflict with conditions in the policy, and which were known to the insurer, or its agent, whose knowledge is imputable to the company, such conditions, uses, or incidents cannot be used to defeat a recovery after a loss has occurred. Issuing or continuing a policy of insurance, with full knowledge by the company of existing facts, which, according to a condition of the contract, make it voidable, is a waiver of the condition." But it is argued that the waiver is not good, under that clause of the policy providing that no officer or agent of the company should have power to waive any provision or condition in the policy unless in writing and attached thereto.

It must be conceded, however, that this stipulation itself could be waived by the insurer, either by express

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agreement or by the conduct of the company. *German Ins. Co. v. Niewedde*, 11 Ind. App. 624; *Sweetser v. Odd Fellows, etc., Assn.*, 117 Ind. 97; *Phenix Ins. Co. v. Lorenz*, 7 Ind. App. 266. It is well settled that a contract of insurance may be by parol, and that such a parol contract may be made by an agent having general authority to make contracts of insurance. *Commercial, etc., Assurance Co. v. State, ex rel.*, 113 Ind. 331, and cases there cited. In *Moffitt v. Phenix Ins. Co.*, 11 Ind. App. 233, it is said that a stipulation in a policy of insurance that the conditions of the policy can be waived only by the general agent, in writing, does not render an oral waiver by a local agent inoperative, since such stipulation may itself be waived. See *German Ins. Co. v. Sanders*, 17 Ind. App. 134.

The conditions as to how this provision of the policy should be carried out were for the benefit of the company. If there was a failure to comply with some condition of the policy, which fact was known to the company, it could have terminated the policy, and refunded the unearned premium. As soon as the failure to observe the conditions became known to the company, the policy was voidable, and the failure of the company to take any action in the matter, having such knowledge, must be held a waiver. Judgment affirmed.

BOARD OF COMMISSIONERS OF PERRY COUNTY, INDIANA,
v. BADER.

[No. 2,533. Filed June 7, 1898.]

COUNTY COMMISSIONERS.—*Claim for Services Rendered During Quarantine against Small Pox.*—A complaint against the county based upon a claim filed with the county commissioners for services rendered as watchman during the time of quarantine against small pox, the certificate of the township trustee being attached thereto stating that the amount of the claim was due claimant out of the township fund of his township, and was presented and not

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paid for want of funds, shows no liability upon the part of the county.

From the Perry Circuit Court. *Reversed.*

Sol. H. Esarey, for appellant.

John T. Patrick and Oscar C. Minor, for appellee.

COMSTOCK, J.—Appellee presented the following claim to the board of commissioners of Perry county, Indiana: "Perry County, Indiana. To Henry Bader, assignee of Peter Weiss, Dr. 25 1-10 days as watchman during time of quarantine against small pox in Tell City, by order of township trustee as evidenced by order hereunto attached, \$31.30. Trustee's Office, Troy township, Perry county, Indiana. Tell City, Ind., May 27, 1895. This is to certify that there is due to the bearer H. Bader, the sum of \$31.30 for (P. Weiss) watchman's order during quarantine. Payable out of the township fund of Troy township, Perry county, Indiana. Gibson Hubbs, Trustee. May 27, 1895. Presented and not paid, for want of funds. Gibson Hubbs, Trustee.

"State of Indiana, Perry County, ss: I, Henry Bader, being duly sworn, upon my oath say that the claim as herein set forth is justly owing me by Perry county; that the same or any part thereof has never been allowed to me heretofore, as I believe, nor to Peter Weiss, by whom the same was assigned to me. Henry Bader. Subscribed and sworn to before me this 4th day of March, 1896. Jno. T. Patrick, Notary Public."

The claim was refused by the board, and an appeal taken to the circuit court of said county, where appellant's demurrer for want of sufficient facts was overruled, and exceptions taken. Issues were joined, and a trial by the court resulted in a judgment in favor of

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the appellee for the amount of his claim. The errors assigned challenge the sufficiency of the complaint.

Appellant contends that the claim fails to show any right of action against the county; that it does not show that the claim against the county is one that the law allows; that it appears therefrom that the services were rendered at the instance of the township trustee. The claim shows that the services were rendered to prevent the spreading of a contagious disease. For such work section 6718, Burns' R. S. 1894, makes provision. It provides that the board of commissioners of each county shall constitute a board of health *ex officio* for the county, "whose duty it shall be to protect the public health, by removal of all causes of diseases, when known, and in all cases take prompt action to arrest the spread of contagious diseases, to abate and remove nuisances, dangerous to the public health, and perform such other duties as may from time to time be required of them by the State Board of Health, pertaining to the health of the people." Under the statute the services rendered were such as the board of commissioners were authorized to make provision for. *Board, etc., v. Fertich*, 18 Ind. App. 1.

The township order made a part of the claim does not make nor mar it. Such services would not be the basis of a claim against the township. Omitting the certificate there yet remains the statement that the county is indebted to the claimant, as assignee, the sum of \$31.30 for services rendered as watchman by Peter Weiss in quarantining against the small pox. This is sufficient to inform the county of the character of the claim and to bar another action for the same cause. Strictness is not required in pleading in presenting claims against the board of commissioners. No formal complaint is necessary, and on appeal no new pleading is required. *Board, etc., v. Wood*, 35

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Ind. 70; *Board, etc., v. Loeb*, 68 Ind. 29; *Board, etc., v. Shrader*, 36 Ind. 89; *Newsom v. Board, etc.*, 92 Ind. 232; *Duncan v. Board, etc.*, 101 Ind. 404. The judgment should be affirmed.

The foregoing is the opinion of the writer. In the opinion of the majority of the court, however, the complaint does not show a liability upon the part of the county. The judgment is therefore reversed, with instructions to the trial court to sustain the demurrer to the complaint.

SPURLIN v. THE STATE, EX REL. VANCELEAVE.

[No. 2,558. Filed June 7, 1898.]

INSTRUCTIONS.—*Elections.—Purchase of Votes.—Penalty.*—In the trial of an action to recover the penalty provided by sections 6325, *et seq.*, Burns' R. S. 1894, for purchasing or attempting to purchase votes at an election held pursuant to law, the court erred in refusing to instruct the jury that defendant was presumed to be innocent of the crime therein charged until such presumption was overthrown by the preponderance of the evidence.

From the Shelby Circuit Court. *Reversed.*

T. B. Adams and Isaac Carter, for appellant.

Wray & Campbell, and *Wilson & Thompson*, for appellee.

BLACK, J.—It is provided by statute, section 6325, *et seq.*, Burns' R. S. 1894, 4768a, *et seq.*, Horner's R. S. 1897, that whoever hires or buys, directly or indirectly, or handles any money or other means, knowing the same is to be used to induce, hire or buy any person to vote or refrain from voting any ticket or for any candidate for any office at any election held pursuant to law, shall be liable to the person hired, bought or induced to vote or refrain from voting by such means, in the sum of \$300.00 and reasonable attorney's fees for collecting the same, in an action to be brought in the name of the State on the relation of the voter

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in whose favor such liability is thus created. Under the provisions of the statute the action has characteristics like those of criminal proceedings in some regards, but it is provided that the rules of evidence shall be the same as in civil causes, and that the trial and continuance of such prosecution, in all respects not by the statute otherwise provided, shall be governed by the law regulating civil suits.

The case at bar was such an action, the appellant being charged by the verified complaint with having, on the 30th day of October, 1896, offered and promised to give and pay to the relator the sum of fifteen dollars in money to induce him to vote for two candidates named at the general election on the 3rd day of November, 1896, it being alleged that thereupon the relator, being so induced to do so, agreed with the appellant so to vote for said candidates.

We set out only the substance of a portion of the complaint, sufficient to indicate the character of the charge against the appellant. On the trial, the court refused to give to the jury an instruction duly proposed by the appellant, wherein, after referring to the charge against appellant in the complaint, it was said that if he did as thus charged, he committed a crime, and that there could not be a verdict against him unless the jury should find that he so offered said money. The rejected instruction then proceeded as follows: "The defendant is presumed to be innocent, and this presumption remains, and must be considered by you in connection with and together with all evidence, if any, in the case that tends to show that the defendant is innocent of the crime charged, until such presumption and evidence are overthrown by a preponderance of the evidence; and unless you find that such presumption and such evidence tending to show innocence, if

any, have been overthrown by a preponderance of the evidence, your verdict must be for the defendant."

In the instructions given, all of which are shown by the record, the court informed the jury that the burden was upon the plaintiff of proving every material fact alleged in the complaint by a preponderance of the evidence, before he could recover, and that if they found that he had proved the material facts of his complaint by a preponderance of the evidence, they should find for the plaintiff, but that if they found that he had failed to prove all the material facts in his complaint by a preponderance of the evidence, they should find for the defendant.

In the instructions given there was no mention of a presumption of the appellant's innocence, and the instruction refused above mentioned was not given in substance unless it was included in and sufficiently covered by what the court instructed relating to the preponderance of the evidence as above stated. It is true that such conduct as that with which the appellant was charged in the complaint would have constituted a crime, it being provided by statute, section 2329, Burns' R. S. 1894, 4779c, Horner's R. S. 1897, that any person who shall give or offer to give, directly or indirectly, any money, property, or other thing of value to any elector to influence his vote at any regular election held in this State pursuant to law, shall be guilty of a misdemeanor, etc. The action was one for the recovery of a civil penalty for a tortious act, which was also a crime. *State, ex rel., v. Schoonover*, 135 Ind. 526. It is also correctly admitted that when a person is charged with the commission of a crime, whether in a criminal prosecution or in a civil action, he is presumed to be innocent until the contrary is satisfactorily established. In a criminal prosecution his guilt must be proved beyond a reason-

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able doubt. In civil actions involving in their issues a charge of crime it has sometimes been held necessary to prove the commission of the crime beyond a reasonable doubt, but the rule prevailing extensively in this country in a civil action, as the case before us must be regarded, requires only that the facts in issue be proved by a preponderance of the evidence, though a charge of crime be involved.

The instruction which was here refused would not, if given, have required proof beyond a reasonable doubt. It did not go to such extent. In Burr W. Jones on Evidence, section 193, it is said, "But where the issue involves a charge of moral turpitude, the presumption of innocence obtains in civil as well as in criminal cases; hence when in a civil action a party is charged with a crime, the evidence should be sufficient to overcome the presumption of innocence; and for this purpose more evidence may be necessary than in ordinary cases."

In *Decker v. Somerset Ins. Co.*, 66 Me. 406, where the action was on an insurance policy against fire, and one ground of defense was that the fire was wilfully set by the plaintiff, or by his procurement, the court, in discussing an instruction said: "To create a preponderance of evidence, the evidence must be sufficient to overcome the opposing presumptions as well as the opposing evidence. Presumptions, like probabilities, are of different degrees of strength. To overcome a strong presumption requires more evidence than to overcome a weak one. * * * Hence it can never be improper to call the attention of the jury to the character of the issue, and to remind them that more evidence should be required to establish grave charges than to establish trifling or indifferent ones. Such an instruction does not violate the rule that in civil suits a preponderance of evidence is all

that is required to maintain the affirmative of the issue; for, as already stated, to create a preponderance of evidence, it must be sufficient to overcome the opposing presumptions as well as the opposing evidence." See, also, *Lyon v. Fleahmann*, 34 O. St. 151.

In *Jones v. Greaves*, 26 O. St. 2, 20 Am. Rep. 752, it was said: "Where the facts charged involve moral turpitude, there is a presumption of innocence, which stands as evidence in favor of the party charged; and the more heinous the offense, the stronger the presumption. It is only where the testimony, when considered in connection with the presumption of law arising in the case, preponderates in favor of the charge that its truth should be found."

In *Lyon v. Fleahmann*, *supra*, it was said: "We usually meet, in connection with the claim that all civil cases must be determined by a preponderance of evidence, the admission that if the issue in a civil action involves a crime, the accused is entitled to the presumption of innocence."

In *Hills v. Goodyear*, 4 Lea (Tenn.) 233, 40 Am. Rep. 5, the court said: "The law in all cases, civil or criminal, presumes innocence. Obviously, therefore, to create a preponderance of evidence in a civil case, where crime is imputed to one party, the other party assumes the burden of not only overcoming the evidence of his opponent, by a preponderance, but of overcoming also the presumption of law in favor of the innocence of his adversary. In other words, there is no preponderance on the side of the charge of guilt, unless the evidence is sufficient to overbalance the opposing presumption as well as the opposing evidence, including evidence of character." In the same case it was further said: "The court should instruct the jury upon the legal effect of the evidence of character or presumption of innocence, and it is the duty of the

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jury to weigh these elements, in connection with the other proof, in arriving at a conclusion on which side the preponderance exists." See, also, *Sprague v. Dodge*, 48 Ill. 142, and the notes following that case in 95 Am. Dec. 523, 528.

The case of *Continental Ins. Co. v. Jachnichen*, 110 Ind. 59, is cited by both parties. It is in harmony with the prevailing modern rule in this country that proof beyond a reasonable doubt should not be required in a civil case involving a charge of crime in the issues. It is also in agreement with the opinions of courts of other states above quoted regarding the presumption of innocence, and it upholds the giving of such an instruction as that asked by the appellant and rejected by the court. That instruction was in a general way covered by the instructions given, wherein the necessity of maintaining the charge against the appellant by a preponderance of the evidence was stated. Yet we think the appellant, having requested it, was entitled to have the attention of the jury called to the presumption of his innocence and to have the jury directed to give due effect to that presumption.

The purchase of votes involves moral obliquity of all parties to the transaction. It is disgraceful, and its disgrace should not be minified. Both the buyer and the seller deserve the severest condemnation. But in the action to recover in behalf of the seller a penalty from the buyer, the alleged buyer should not be deprived of the proper consideration by the jury of the presumption of innocence which is indulged in favor of every man charged with crime, at least where he tenders an instruction properly stating the law on that subject. The instructions given would have been sufficient as against a party not asking further

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instruction, but we think the court erred in omitting the instruction asked. The judgment is reversed, and the cause is remanded for a new trial.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILWAY
COMPANY v. BRADFORD.

[No. 2,268. Filed Feb. 17, 1898. Rehearing denied June 7, 1898.]

PARENT AND CHILD.—*Action for Death of Child.*—Section 267, Burns' R. S. 1894, gives to the father the right to maintain an action for the injury or death of his child. p. 349.

RAILROADS.—*Failure to Fence Track.*—*Injury to Child Wandering on Track.*—An action cannot be maintained against a railroad company for damages for the death of a child which had wandered upon the railroad track by reason of the track not being fenced as provided by section 5323, Burns' R. S. 1894, where no negligence is charged other than the violation of such statute. pp. 349-355.

SAME.—*Trespasser on Track.*—*Children.*—A child two years of age is not by reason of its tender age prevented from becoming a trespasser upon a railroad track. p. 355.

SAME.—*Failure to Give Signals of Approach of Train.*—*Damage for Death of Child while on Track.*—The object of the statutory provision requiring signals to be given of the approach of a train to a highway crossing is to warn persons having the right to use the crossing of the approach of danger, and an action cannot be maintained against a railroad company based upon the failure to give such statutory signals for the death of a child which had wandered upon the track and was killed by a train of cars, where the child was a trespasser on the track. pp. 355-359.

From the Daviess Circuit Court. *Reversed.*

W. R. Gardiner, C. G. Gardiner, W. R. Gardiner, Jr., and E. W. Strong, for appellant.

C. K. Tharp and J. McD. Huff, for appellee.

HENLEY, J.—Action by the appellee against the appellant, the Baltimore & Ohio South Western Railway Company, for damages sustained by appellee by reason of the death of his infant daughter, who was killed by one of appellant's locomotives. The complaint was in two paragraphs. Both paragraphs of

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complaint were demurred to by appellant. The lower court overruled the demurrers to each paragraph of the complaint, to which ruling of the court appellant excepted, and has assigned such ruling as error to this court. Appellant answered with general denial, and upon the issues thus formed there was a trial by jury. The court instructed the jury in writing. There was a verdict and judgment in favor of appellee for \$850. The appellant moved the court for a new trial, which was overruled, to which ruling appellant excepted and assigns such ruling as error to this court. The record in this case properly presents all the questions argued by appellant's counsel.

It is first contended by appellant that the first paragraph of appellee's complaint does not state facts sufficient to constitute a cause of action, and that the court erred in overruling the demurrer thereto. The statutes of this State give to the father the right to maintain an action for the injury or death of a child. Section 267, Burns' R. S. 1894 (266, Horner's R. S. 1897); *Pittsburg, etc., R. W. Co. v. Vining's Admr.*, 27 Ind. 513; *Mayhew v. Burns*, 103 Ind. 328.

The first paragraph of complaint alleges in substance: That appellee was, on and prior to the 8th day of June, 1895, the father of one Ruth Bradford, who was a healthy, bright and intelligent child, and at that time two years old; that appellant, a railroad corporation, owned, operated and ran over its track trains of cars by and through the city of Washington, Daviess county, Indiana; that appellee on said day, together with said Ruth and his wife, were living on a farm which is situated about a mile west of Washington and which adjoins and abuts upon and lies immediately north of appellant's track and right of way; that the house in which appellant lived was situated about one hundred feet from appellant's track,

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in an open space of ground used by appellee for a yard and garden, and which open space extended from the house down to and along appellant's right of way; that on said day appellant, at about the hour of six o'clock and fifteen minutes p. m., ran an extra train of cars from its shops at Washington to Vincennes, Indiana, and as said train passed by appellee's house it struck said Ruth, who had wandered upon the track, and killed her; that appellant and his wife at all times vigilantly watched after the comfort and safety of said child, but that on said day, without any fault of appellee or any member of the family, said child escaped from their sight for a few moments and wandered upon the railroad track, and was run over and killed as aforesaid; that, quoting from the complaint, said child was killed on account of the carelessness of appellant in this: "That all the lands along defendant's right of way where the same adjoins and abuts upon the lands occupied by the plaintiff, including the space used by him as his yard and garden, were open, cleared, and in cultivation, and it became and was the duty of the defendant to build, keep and maintain along the north side of its right of way where the same passes by the plaintiff's house, yard and premises, a fence sufficient and suitable to turn and prevent cattle, horses, mules, sheep, hogs, or other stock from getting on said railroad track; that notwithstanding said duty, and wholly in disregard of the same, the said defendant carelessly and negligently and knowingly suffered and permitted the fence, which had been erected years ago along its right of way by the plaintiff's home and premises, to become old, worn out and torn down to the ground, so that the same offered no obstruction whatever to any kind of stock or to the plaintiff's child, and the defendant carelessly, negligently, and wilfully failed

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and refused to repair the fence, or to keep and maintain the same in such repair as would be sufficient and suitable to turn and prevent cattle, horses, mules, sheep or other stock from getting on said railroad track at the place where it passes the premises of the plaintiff; that said Ruth escaped from her home and went over and upon the defendant's said railroad track at or about where the defendant had suffered and permitted the fence to become out of repair and torn down to the ground, and was thus run over and killed by the defendant, without any fault or negligence upon his part; that if the fence had been built and maintained as it was the duty of the defendant to do, the said Ruth could not and would not have gone on said track and been killed, as aforesaid; that the said Ruth went on said railroad track, and was killed without any fault or negligence on his part, but solely because of the carelessness and negligence of the defendant in failing and refusing to keep said fence in proper repair, and in suffering and permitting the same to be and remain out of repair and torn down to the ground; that by reason of the defendant's said carelessness and negligence resulting in the death of his child, he has sustained great damage in the loss of the services of the said Ruth to wit, from the death of the said child until she would have arrived at the age of twenty-one years, amounting to \$3,000, and has incurred \$50 funeral and burial expenses, all to his damage in the sum of \$3,050, for which he demands judgment and all proper relief."

There can be no doubt as to the theory upon which this paragraph of complaint is drawn. It is predicated upon the theory that appellant was required by law to construct a fence along the line between its right of way and the land of appellee sufficient to turn cattle, horses, mules, sheep, hogs, and other

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stock; that appellant had not constructed such a fence; that if such fence had been constructed and maintained by appellant along and by appellee's premises, it would have prevented appellee's child from going upon the railroad and thus prevented appellee's injury; that in consequence of the failure to construct and maintain such fence, appellee's child did wander upon the railroad track and was killed by one of appellant's trains. No other negligent act is charged against appellant in this paragraph of complaint, save and except the single act of failing to construct and maintain the fence along its right of way.

The statutes of this State requiring railroads to fence their rights of way is as follows: "That any railroad corporation, lessee, assignee or receiver, or other person or corporation running, controlling or operating, or that may hereafter construct, build, run, control or operate any railroad into or through this state, shall, within twelve months of the day of the taking effect of this act, as to those already completed, and within twelve months from the date of construction and completion of any part of a line of road hereafter constructed, erect, build, construct and thereafter maintain fences, which may be constructed of barb wire, on both sides of such railroad throughout the entire length, completed within the state of Indiana, sufficient and suitable to turn and prevent cattle, horses, mules, sheep, hogs or other stock from getting on such road, except at the crossings of public roads and highways, and within such portions of cities and incorporated towns and villages as are or may be hereafter laid out and platted into lots and blocks, and shall, also, and in like manner and within the time hereinbefore prescribed, construct where the same has not already been done, and thereafter maintain at all pub-

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lic road and highway crossings now existing or hereafter established, barriers, and cattle guards suitable and sufficient to prevent cattle, horses, sheep, hogs and other stock from getting on such railroad; *Provided, however*, when such fences and cattle guards are not made as herein provided or when such fence or cattle guards are not kept in repair, such railroad corporation, or person operating the same, shall be liable for all damages which may be done by the agents, employes, engineers, or cars of such corporation or persons operating the same, to any such cattle, horses, sheep, hogs or other stock thereon; *Provided, however*, that such railroad corporation or other person operating the same shall not be required to fence such railroad track through unimproved and uninclosed lands, and the provisions of this act shall not apply to such parts and portions of any such railroad which runs through unimproved and uninclosed lands, but when such lands become improved and inclosed, on three sides the same shall apply, and such railroad corporation or person operating the same shall be required to fence the same under the provisions of this act within six months from the date of such inclosure." Section 5323, Burns' R. S. 1894, 4098a, Horner's R. S. 1897.

This court is of the opinion that the injury herein complained of is foreign to the object of the legislative order above referred to, and that there could be no recovery under the first paragraph of appellee's complaint; that the statute imposes no duty to fence as respects children, and has no application to a case like the one now before us. It is in many respects similar to the case of *Gorris v. Scott*, L. R. 9 Exch. 125. The last named case was a suit instituted by the owner of some sheep to recover from a ship-owner for the loss of the sheep by reason of their being

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washed overboard on account of the neglect of the ship owner to comply with the orders of the privy council, made pursuant to parliamentary authority, which orders compelled ship owners to dispose of domestic animals on shipboard in a certain way therein set out. The object of these requirements as to shipment was to prevent unnecessary suffering to the animals and to prevent the spread and communication of diseases among them. It was held by the court that the injury complained of was foreign to the object of the legislative order referred to, and a recovery was denied, although it was admitted that, had the law been complied with as to the disposition of the animals, they would not have been washed overboard, and the owner of the stock would not have suffered the injury complained of.

This principle is fully discussed in the well-considered case of *Hall v. Brown*, 54 N. H. 495. The Supreme Court of this State have held that the act of April 13, 1885 (section 5323, *supra*), did not repeal the act of 1863 (section 4025, *et seq.*, R. S. 1881). The title of the act of 1863 is, "An act to provide compensation to the owners of animals killed or injured by cars, locomotives, or other carriages of any railroad company in this State, and to enforce the collection of judgments rendered on account of the same." One section of the act provides that the act shall not apply to any railroad that may be securely fenced and the fences properly maintained. The act of 1885 provides that the railroads shall be fenced, if not by the companies, corporations or persons operating them, then by the land owner through whose land the road passes, under certain conditions in the statute set forth. The liability of the company failing to perform all the acts required by this law, is determined by the act itself. It is provided therein that when the fences, such as are de-

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scribed in the act, are not made as therein provided, or when such fences or cattle guards are not kept in repair, the railroad corporation or person or company operating the same shall be liable for all damages done by the agents, employes, engines or cars of such corporation to any such cattle, hogs, sheep, horses or other stock thereon.

Our statutes upon the subject of fencing railroad rights of way are plain, and the mischief to be remedied thereby is fully and completely set out. What manner of a fence could a body of law-makers describe which would be sufficient to prevent children from going upon the right of way of a railroad company? Certainly no fence which would be sufficient to turn horses, cattle, sheep and hogs, as is specified by our law, would offer much of an obstacle to the ordinary boy four years old and upward, who might conclude in the absence of parental care, to climb over it. This court will take judicial notice that the child two years old is *non sui juris* and that, therefore, negligence will not be predicated upon its own conduct, but its tender age will not prevent it from becoming a trespasser (see *Rodgers v. Lees*, 140 Pa. St. 475), and as a trespasser the appellant owed no duty to it except that if the child was discovered on appellant's premises in a place of danger, to use every effort to prevent its injury. *Pennsylvania Co. v. Meyers, Admx.*, 136 Ind. 242; *Wabash R. W. Co. v. Jones*, 163 Ill. 167, 45 N. E. 50.

This brings us to the consideration of the second paragraph of complaint, wherein, after repeating the allegations of the first paragraph of complaint, appellant's negligence is stated in substance as follows: That it was the duty of appellant, in running its trains, and when the same was not less than eighty or more than one hundred rods from the public highway crossing, to sound the whistle on the engine three

times distinctly, and to ring the bell on said engine continually until the train passed the crossing; that the engineer on appellant's train failed, neglected and omitted to sound the whistle when the said train was eighty to one hundred rods from said crossing, or at any time, until said train was in the act of striking said child, and failed and neglected at any time to ring the bell on approaching said crossing, and failed and neglected to keep a proper lookout in front of said engine as the said engine approached the crossing. The second paragraph then continues as follows: "That by reason of defendant's neglect to sound the whistle three times distinctly when said engine was between eighty and one hundred rods from said highway crossing, and ring the bell continuously, neither the said child nor the plaintiff had any notice or warning of the approach of the train until it had got to a point opposite plaintiff's home; that had said whistle been sounded, as it was the defendant's duty to do when the same was eighty rods distant from said highway crossing, plaintiff's immediate attention, as it was his custom, on hearing the whistle of the engine, to look out for the child, would have been drawn to the perilous position of said child in time for him to get to it and rescue it; that had said engineer kept a careful and vigilant lookout on said railroad track in front of his engine, he could have discovered said child on said track in time to check and slow said engine up and stop the same before it struck the child. Plaintiff says that because of all the concurrent acts of negligence aforesaid, to wit, to fence said track, to sound the whistle and ring the bell so as to warn plaintiff of the approach of said train, and to keep a lookout and discover said child and slow up the train so as to give plaintiff time to

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rescue said child, the said child was run over and killed by defendant.”

It is not contended that appellee's child was not a trespasser upon appellant's track and right of way, and it is not alleged that appellant's engineer saw the child upon the track in time to have checked the train and avoided the injury. Then the injury could not have been wilfully inflicted; neither was the act negligently done because appellant, not seeing the trespassing child, owed no duty to it. If the train had been thrown from the track by reason of striking a trespasser, and an injured passenger thereon had brought suit against the railroad company, alleging the negligence of the company in that the engineer failed properly to observe the track and keep a lookout ahead for obstructions of any kind, or if the engineer had seen the child upon the track, and after seeing it had failed and neglected to use every means in his power to avert the disaster, then an entirely different case would be presented. The only other act of negligence charged in the second paragraph of appellee's complaint is appellant's failure to give the statutory signals at the crossing near where appellee's child was killed. There is no averment in the complaint that appellant's failure to give the statutory signals for the crossing contributed to the death of the child, except that it is alleged that if the whistle had been sounded and the bell rung, as is provided by the statute, appellee could have known of the approach of the train in time to find the child and rescue it.

The statute of this State in regard to signals to be given at crossings is as follows: “It shall be the duty of all railroad companies operating in this State to have attached to each and every locomotive engine a whistle and a bell, such as are now in use or may be hereafter used by all well managed railroad com-

panies, and the engineer or other person in charge of or operating such engine upon the line of any such railroad shall, when such engine approaches the crossing of any turnpike or other public highway in this State, and when such engine is not less than eighty nor more than one hundred rods from such crossing, sound the whistle on such engine distinctly three times and ring the bell attached to such engine continuously from the time of sounding such whistle until such engine shall have fully passed such crossing: *Provided*, etc., * * * ." Section 5307, Burns' R. S. 1894 (Acts 1881, p. 590).

We think the statute was intended solely for the protection of persons who might be upon or approaching crossings, or of animals being driven along the highway, and has no reference to a case like this. Here was a child, a trespasser upon appellant's right of way, not upon the highway or the crossing, but a considerable distance from the highway crossing, and had not been upon the crossing, but had come upon the right of way as a trespasser from the very first. It is not alleged that any one in charge of the train saw the child, but the allegation is that had the statutory signals been given for the crossing, the father of the child could have been warned that the train was approaching, and could then have searched for the child, and if found on appellant's track, could have rescued her before any injury was done. The case of *Metallic Compression Co. v. Fitchburg R. R. Co.*, 109 Mass. 277, was an action brought against a railroad corporation for damages for negligently severing a hose which was laid across the track in the town of Summerville, thereby cutting off the supply of water from a fire which was consuming plaintiff's factory, whereby the building and its contents were destroyed. It was said in that case: "One

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of the grounds taken by the plaintiff is, that the defendant's train did not stop before crossing the Grand Junction Railroad, and thereby violated the General Statutes, c. 63, section 93, which requires that trains shall be stopped before crossing another railroad at grade. The point of the crossing was in sight of the fire, and a few hundred feet west of it. But the object of the statute was solely to prevent the collision of trains at crossings, and had no reference to the extinguishing of fires. It is not applicable to this case." And so the object of the statutory provision in this State requiring the sounding of the whistle and the ringing of the bell upon the approach of a train at a highway crossing is to warn "persons with vehicles and driving animals," they having a perfect right to use the highway and crossing; and it is presumed that if the signals are given they will avoid the danger. Trespassers cannot complain that the statute was violated. *Louisville, etc., R. W. Co. v. Green*, 120 Ind. 367; *Ivens v. Cincinnati, etc., R. W. Co.*, 103 Ind. 27; *Toomey v. Southern Pacific R. R. Co.*, 86 Cal. 374, 24 Pac. 1074; *Louisville, etc., R. W. Co. v. Howard*, 82 Ky. 212.

For the reasons above stated we are of the opinion that the second paragraph of complaint did not state a cause of action, and the lower court erred in overruling the demurrer addressed thereto. Cause reversed, with instructions to the lower court to sustain the demurrer to both paragraphs of the complaint.

CALLAHAN v. HEINZ ET AL.

[No. 2,405. Filed April 1, 1898. Rehearing denied June 7, 1898.]

PARTNERSHIP.—*Assignment for Benefit of Creditors.*—*Cannot be Made by One Member of Firm.*—One member of a partnership can not make an assignment for the benefit of creditors of the partnership property nor create a trust therein without the consent or ratification of the other members of the firm.

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From the Marshall Circuit Court. *Reversed.*

Harley A. Logan, for appellant.

J. D. McLaren, for appellees.

COMSTOCK, J.—This was a suit brought by Andrew P. Callahan, doing business under the firm name of the Prussing Vinegar Company, against Jacob Heinz, Frederick J. Heinz, and Charles Horstmeyer, doing business under the firm name of Heinz Bros. & Co., on a foreign judgment rendered on the 6th day of July, 1895. After the commencement of the suit, appellant filed his affidavit and undertaking in attachment, alleging that the defendants were nonresidents of the State of Indiana and had sold and were about to sell their property to hinder and delay their creditors. A writ was issued to the sheriff of the county, on which he seized personal property which had been transferred to John R. Deitrich before the issuing of said writ as trustee for the creditors of the firm named in the bill of sale to said Deitrich in the firm name by said Horstmeyer.

The cause was put at issue by answers and replies; a trial had, resulting in a judgment in favor of the plaintiff (appellee) in the sum of \$2,823.25, and finding and judgment for the defendants on the attachment proceedings. The appellee filed his motion for a new trial upon the issues formed upon the affidavit in attachment, on the ground that the finding of the court was not sustained by sufficient evidence, and that it was contrary to law. This motion was overruled.

Appellant assigns as error the overruling of his demurrer to the second paragraph of answer of appellee Horstmeyer to appellant's affidavit in attachment, and the overruling of appellant's motion for a new trial. The said second paragraph of answer to the plaintiff's affidavit for attachment avers that prior

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to the levy of the writ of attachment, certain property, describing it, had been delivered to one John R. Deitrich, under "a written instrument of trust;" that the identical property was attached by the sheriff by virtue of the writ; that the written instrument of trust and delivery of possession was made in good faith by Charles Horstmeyer, one of the partners constituting the firm of Heinz Bros. & Co.; that the creditors named in said trust were *bona fide*, and the transfer made to Dietrich was to protect them; and that the written instrument of trust was shown to the sheriff, and was disregarded, and the property seized under the writ and held until July 25, 1895, when it was replevied from said sheriff by said John R. Dietrich. The paragraph further avers that said property was transferred by said Heinz Bros. & Co. by said Charles Horstmeyer, the general manager of said firm, for the uses and purposes aforesaid, and that he accepted the possession of the same as intended for said uses, and was in the possession and control of all of said property when the plaintiff sued out his writ of attachment.

The controlling question presented and argued by the assignment of errors, as stated by appellant's counsel is: "Can any number less than all the partners of a firm make an assignment or create a trust with or without preference, or do any act which excludes the remaining partners from the enjoyment of the firm property, without the consent or ratification of every member of the firm?" Appellant's counsel claim that this question should be answered in the negative. Counsel for appellees insist that under the terms of co-partnership under which appellees were doing business, Horstmeyer had the right to control and dispose of the property without reference to the power of a single member of the firm, under the law.

There is no conflict in the evidence. It is properly in the record, and the question presented may be answered by ascertaining the law applicable to the facts.

The "written instrument of trust" is in evidence, and is in the following language: "Know all men by these presents, that we, Charles Horstmeyer, Fred J. Heinz, and Jacob Heinz, doing business as partners under the firm name of Heinz Bros. & Co., in Marshall county, State of Indiana, and elsewhere in said State and in the United States, the principal office of said firm being at Pittsburg, state of Pennsylvania, at Nos. 317 and 319 First avenue, by Charles Horstmeyer, of said firm, do hereby sell, transfer and deliver into the actual possession of John R. Dietrich, of Bremen, in Marshall county, State of Indiana, the personal property of said firm now at Bremen, aforesaid, and described generally as follows: Two salting houses, each 24 x 136 feet, and all property and fixtures of every kind and description, now in and about said houses and used for carrying on the business of salting, curing, receiving and removing pickles and other products of the soil, as heretofore used and carried on at said place by said firm of Heinz Bros. & Co. All of said property including said houses and the property therein, is of the probable value of \$8,000.00, and it is all hereby sold, transferred, and delivered without any reservation to said John R. Dietrich, in trust, first to pay in full a claim held by J. R. Dietrich & Co., estimated at \$1,240, but it is to be paid in full, whether or not it is found to be more or less than the estimated amount, out of the net proceeds of the sale of this year's crops of pickles and other products, heretofore contracted for by said firm of Heinz Bros. & Company, and out of the sale of said personal property, including said houses, and the net remainder of the amount or amounts realized by said trustee shall be distrib-

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uted pro rata to the following named creditors of said firm of Heinz Bros. & Co., namely: Alois Bihler, of No. 9 McGee Street, Pittsburg, \$1,491.00; Katie Gaub, No. 29 Fourteenth street, S. S. Pittsburg, \$718.75; the German Savings and Dep. Bank, Birmingham, \$9,630.74.

"The said claim of J. R. Dietrich & Co., estimated at \$1,240.00 is for cash advanced to the growers of pickles and other products under last year's contracts of said growers with said Heinz Bros. & Co., under a promise of said Heinz Bros. & Co. to repay said Dietrich & Co. on April 15, 1895, and the estimated amount stated herein is the balance due and unpaid to said Dietrich and Company, and said trustee shall pay in full all the growers of pickles and other products who shall deliver their said products to said trustee under existing contracts with the said Heinz Bros. & Co. as soon as the same shall have been cured and sold. And the said John R. Dietrich hereby accepts the trust above specified, and hereby acknowledges the delivery of said salting house and other personal property to him, in trust for the use and purposes above specified, and none other, and he agrees faithfully to perform and carry out said trusts, in consideration of the premises, and of a reasonable compensation for his services and expenses as such trustee. All labor and expenses of carrying on and closing out the said business of said Heinz Bros. & Co., shall be paid in full out of the gross proceeds of said property and business, and the net proceeds distributed as above directed. In witness whereof the said Heinz Bros. & Co. and the said John R. Dietrich, as trustee have hereunto signed their respective names on the sixth day of July, 1895. All erasures and interlineations were made before signing. Heinz Bros. & Co. Charles Horstmeyer. John R. Dietrich, Trustee."

The parts of the articles of copartnership which we deem it necessary to set out are as follows: "Agreement made this 11th day of May, A. D., 1895, between Charles Horstmeyer, Fred J. Heinz and Jacob C. Heinz: Whereas, said parties hereto have heretofore been engaged as partners in the business of manufacturing pickles, etc., now this agreement is to attest a settlement of all accounts between the parties made this day, the said settlement being as follows: * * *

Now, therefore, in consideration of the premises and agreements to pay said Horstmeyer the sums hereinbefore set forth, it is hereby agreed that the said firm or partnership of Heinz Bros. & Co. shall continue for the period of three years from this date, and, the foregoing being a complete liquidation of the interests of the several parties, it is now agreed that, subject to the payment of the sums due said Horstmeyer as aforesaid, the interests of said parties shall be as follows: Charles Horstmeyer, one-half; Fred J. Heinz, the one-fourth; Jacob C. Heinz, the one-fourth. * * *

"It is also agreed that each of the parties shall devote all of his time to the business of the firm, and shall commence work each day (except Sunday) at 7 o'clock a. m., and for such work each party shall receive compensation at the rate of fifteen dollars a week. The duties of the several parties shall be as follows: The said Charles Horstmeyer shall be the general manager of the business of the said firm, and shall have full and sole power in regulating the business of the firm. The said Fred J. Heinz shall have charge of the manufacturing department. The said Jacob C. Heinz shall have charge of the selling and buying of goods with the cooperation of H. Amelung and Miss McClure, or of such of the employes of the firm as said Horstmeyer may designate."

The good faith of the transfer of the property is not

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questioned, nor of the indebtedness for which it provides. Under the law, one partner has the right to sell those articles of property which are held for sale, but not the right to sell the property with which the business is conducted. *Lowman v. Sheets*, 124 Ind. 416. Bates on Partnership, section 401, says: "But I have no doubt but that the power of sale must be confined to those things held for sale, and that the scope of the business does not include the sale of property held for the purposes of the business, and to make a profit out of it, and that this only is the true rule." Bates on Partn., p. 346; Burrill on Assignments, p. 84, par. 52.

On page 88, the last named author says: "While the law remains thus unsettled on this point, it may be laid down as the only safe practical rule, that in making assignments of partnership property, particularly to trustees, all the partners, special as well as general, dormant as well as active, should be consulted; and the assignment should either be the joint act of all, or should be made by the express authority or with the consent or concurrence of those who do not actually execute it, or subject to ratification on their part." Lindley on Partn., p. 129, and authorities cited; 17 Am. and Eng. Ency. of Law, p. 1045, and authorities cited; *Davenport Mills Co. v. Chambers*, 146 Ind. 156. We do not deem it necessary to extend the list of authorities.

The property transferred is described as, "two salting houses, each 24 x 136 feet, and all the property and fixtures of every kind and description, now in and about said houses, and used for carrying on the business of salting, curing, receiving, and removing pickles and other products of the soil, as heretofore used and carried on at said place by said firm of Heinz Bros. & Co. All of said property including said

houses and the property therein, is of the probable value of \$8,000.00." It is evident that the sale was attempted to be made of the property used in carrying on the business. If he did this without the consent or sanction or subsequent ratification of the remaining partners, his act would be invalid.

The bill of sale, it will be observed, also provides for the application of the proceeds of the property to the payment of certain creditors of the firm. It contemplates the closing out of the business in the following language: "All labor and expenses in carrying on and closing out the said business of Heinz Bros. & Co. shall be paid in full out of the gross proceeds of said property and business, and the net proceeds distributed as above directed." It gave to the trustee the authority to dispose of the property and close out the business, without the assent of the other members of the firm. Unless this was done with the sanction of the remaining members of the firm, or was subsequently ratified, Horstmeyer exceeded his power. Under a claim of appellee's counsel, the articles of co-partnership empowered said Horstmeyer to make such transfer. The reply of appellee denies that the remaining members of the firm, Jacob C. Heinz and Frederick J. Heinz, were consulted by him with reference to said assignment; denies that they had knowledge that it was to be made, or that they at any time sanctioned, ratified or consented to it. This is sworn to by said members of the firm.

The record does not show that they had any knowledge of the transfer, nor even sanctioned, approved or ratified it. If, then, the transfer is good as against the plaintiff, it must be by virtue of the articles of co-partnership. That part of said articles by reason of which appellee claims to have been empowered to act in the premises, reads as follows: "It is also agreed

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that each of the parties shall devote all of his time to the business of the firm, and shall commence work each day (except Sunday) at 7 o'clock a. m., and for such work each party shall receive compensation at the rate of fifteen dollars a week. The duties of the several parties shall be as follows: The said Charles Horstmeyer shall be the general manager of the business of the said firm, and shall have full and sole power in regulating the business of the firm. The said Fred J. Heinz shall have charge of the manufacturing department. The said Jacob C. Heinz shall have charge of the selling and buying of goods with the cooperation of H. Amelung and Miss McClure, or of such of the employes of the firm as said Horstmeyer may designate." The articles of copartnership were entered into May 11, 1895. The business was manufacturing pickles and was to continue three years from said date.

The business of which the said Horstmeyer was to have the management was manufacturing pickles. There was given him authority to determine how it should be conducted for that purpose, but not to make a disposition of the property used in carrying on said business, which would certainly terminate the business itself. A partnership is formed only for the purpose of conducting certain specified business. An assignment for the benefit of creditors may become necessary, but it is not contemplated and is not within its scope and objects. In this connection we refer to *Woolridge v. Irving*, 23 Fed. 676, and *Hook v. Stone*, 34 Mo. 329.

The authorities recognize conditions in which one partner may act in the absence of the other, as when the other partner is absent and his whereabouts is unknown, or when he has absconded or is a great distance away, and immediate action is necessary to pre-

vent involuntary preferences, etc. Such conditions did not exist in the case at bar. Counsel for appellee in his able brief cites *Sullivan v. Smith*, 15 Neb. 476, 19 N. W. 620, in which an assignment by one of the partners was upheld. The only other member of the firm had absconded with a large amount of the firm's means, and the court held that, under the circumstances, the remaining partner had the implied authority to make the assignment. The evidence in the case before us discloses that Horstmeyer knew the residence and address of each of his partners, was in easy reach of them, and could easily and quickly communicate with them, but that he made no attempt and apparently had no desire to do so.

Counsel for appellee makes the point that upon cross-examination, appellee propounded to Horstmeyer the following question: "You are asked whether you notified Fred J. Heinz about transferring this property without consulting them about the transfer to Dietrich. Tell the court why you did not." On that appellant objected to the question, and the objection was sustained, and that now he ought not to complain that the other partners were not notified. Counsel made no further attempt by evidence in chief to show why they were not notified nor consulted. The burden was upon the appellees to make this explanation. The evidence shows that Fred J. Heinz and Jacob C. Heinz were residents of the state of Pennsylvania; that the transfer of said property to Dietrich disposed of all the property then owned by the firm of Heinz Bros. & Co. Under the weight of the authorities the court erred in the rulings assigned as errors. The judgment is reversed, with instructions to the trial court to sustain the demurrer to the second paragraph of appellee's answer to the affidavit in attachment.

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NICHOL ET AL. v. HAYS ET AL.

[No. 2,518. Filed June 9, 1898.]

MARRIED WOMEN.—Deeds.—Covenants.—Suretyship.—A married woman who with her husband conveys her separate real estate by warranty deed in satisfaction and payment of a debt owing by her husband to the grantee is liable on her covenants of warranty for a failure of the title to such real estate.

From the Madison Superior Court. *Reversed.*

John W. Lovett and *Fred E. Holloway*, for appellants.

Bagot, Ellison & Bagot, for appellees.

ROBINSON, J.—The question presented by this appeal is whether a married woman, who, with her husband, conveys her separate real estate by deed of general warranty in satisfaction and payment of a debt owing by her husband to the grantees, and which is so accepted by the grantees, is liable on such warranty for a failure of the title to such real estate.

It is not to be denied that a promise may rest upon a sufficient consideration, and be binding, although the benefit moves to a third person. It is well settled that the consideration for a promise need not be a benefit to the promisor, but it may consist of a benefit moving to a third person, or it may be a detriment to the promisee. The statute, section 6962, Burns' R. S. 1894, provides that a married woman may take and hold property which, with its proceeds, shall be under her control as if she were unmarried. "And she may, in her own name, as if she were unmarried, at any time during coverture, sell, barter, exchange, and convey her personal property; and she may also, in like manner, make any contracts with reference to the same; but she shall not enter into any executory con-

tract to sell or convey or mortgage her real estate, nor shall she convey or mortgage the same, unless her husband join in such contract, conveyance or mortgage: Provided, however, That she shall be bound by an estoppel *in pais*, like any other person." Section 6963, Burns' R. S. 1894, provides that, "A married woman shall be bound by her covenants of title in conveyances of her separate property, as if sole. She shall be bound, in like manner, as principal on her official bond." By section 6964, Burns' R. S. 1894. "A married woman shall not enter into any contract of suretyship, whether as endorser, guarantor, or in any other manner, and such contract, as to her, shall be void."

The complaint alleges that the consideration for the deed was the release and satisfaction of a debt held by the grantees against Thomas W. Hays, and that appellants in consideration of the deed released and satisfied the debt. This was an extinguishment of the debt of Thomas W. Hays. The court properly gave judgment against him, because he is liable on the warranty. But the debt for which he was liable was extinguished, and it cannot be said that holding the wife liable on her warranty is holding her liable as surety for the debt. The consideration for the deed passed to a third person, but that was a sufficient consideration. The consideration which binds a surety must be executory. The contract in question was executed. Its object was performed. The debt ceased to exist. The rights and liabilities of the parties are to be determined without reference to the previous debt of the husband, because there is now no such debt.

If it is said that the wife is surety for her husband in this case, it must be because she has undertaken to answer for his debt, and that it is now sought to enforce that undertaking. But such is not the fact un-

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der the allegations of the pleading. The debt has been discharged. It is true, the amount of the recovery in this particular case is the amount of the husband's prior debt; but it is not a recovery of that debt. The contract upon which a recovery is now sought is not a contract by which she promised to pay the husband's debt if not paid by him. The husband's obligation has been discharged, and it is now sought to enforce an entirely different obligation under a statute. The statute is plain in its terms and makes a married woman liable on her warranty in conveyances of her separate property as if sole. It is the opinion of the court that an action on her contract of warranty in the case at bar cannot be construed to be an action on her contract of suretyship. Judgment reversed, with instructions to overrule the demurrer of Ann E. Hays to the complaint.

REDMAN ET AL. v. BURGESS ET AL.

[No. 2,547. Filed June 9, 1898.]

NOTICE.—*By Publication of Pendency of Action.*—*Attachment and Garnishment.*—It is not necessary that a notice by publication to a nonresident defendant of the pendency of an action for a breach of warranty, nor the affidavit on which the publication is based, should state that the demand was to be enforced by attachment and garnishment. *pp. 372-374.*

SAME.—*By Publication of the Pendency of Action.*—*Contents of Notice.*—The third division of section 320, Burns' R. S. 1894, providing for notice of the pendency of actions, states the various grounds disjunctively, making each ground a distinct cause, and it is only necessary that one of the grounds set out in the complaint be stated in the notice. *pp. 374-378.*

From the Montgomery Circuit Court. *Reversed.*

M. W. Fields, A. P. Twineham, Benjamin Crane and Albert B. Anderson, for appellants.

M. W. Bruner, A. D. Thomas, W. T. Whittington and Paul & Van Cleave, for appellees.

COMSTOCK, J.—Cornellius Redman, George E. Daugherty and Thomas H. Emerson brought suit in the court below against Lewis W. Cochran and Robert and Charles Burgess.

Cochran was a resident of Montgomery county, State of Indiana. Robert and Charles Burgess were residents of the state of Illinois. Cochran appeared to the action. There was no appearance for or by the Burgesses. Plaintiff filed affidavits in attachment and garnishment and caused publication to be made in a newspaper for the defendants Burgess and Burgess. Writs in garnishment were issued against the persons who were indebted to Burgess and Burgess, and they appeared and answered as garnishees. The result of the trial was a judgment in favor of plaintiffs and the garnishment of the claims due Burgess and Burgess.

The defendants in that suit, Burgess and Burgess (appellees herein), instituted this suit to review the judgment. In their complaint they set out the errors claimed, and a transcript of the judgment and proceedings therein.

The errors assigned in the complaint were as follows: (1) That no affidavit was filed upon which to base the publication made in said cause. (2) That no affidavits were made and filed upon which publication was ordered and made, except the affidavits in attachment and garnishment, which were not sufficient to warrant such publication. (3) The notice issued and published was not sufficient to give the court jurisdiction. (4) The newspaper in which said publication was made was not named or specified in any order of court or by indorsement on the complaint, but the plaintiff's attorneys, Crane and Anderson, at the time of the entry of the order of publication, directed the clerk of said court to publish said notice of nonresi-

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dence in the Crawfordsville Journal, and that said newspaper was orally named and said notice published. (5) The court did not have jurisdiction to render the judgment and decree in said court. A demurrer to the complaint was overruled, and appellants refusing to plead further, the court found for the plaintiffs on the issues of law and rendered judgment, reviewing and reversing said judgment. The error assigned upon this appeal is the action of the court in overruling the demurrer to the complaint.

We find upon an examination of the record, that on the 17th day of March, 1896, appellants filed their complaint in the Montgomery Circuit Court against Cochran, Burgess and Burgess, to recover damages for alleged fraudulent representations and breach of warranty in the sale of a certain stallion. Afterwards, to wit, on the 2nd day of April, 1896, plaintiffs filed in said cause an affidavit in attachment and an affidavit in garnishment against the defendants in said cause, Robert and Charles Burgess. The affidavits were filed in time. Section 925, Burns' R. S. 1894.

The affidavit in attachment stated that the cause of action was for damages by reason of fraud and deceit practiced by the defendants in the sale of a horse by said defendants to the plaintiffs, and for breach of warranty of said horse; that the plaintiffs' claim was just, and that the affiant believed the plaintiffs ought to recover from said defendants the sum of \$1,000.00, and that the defendants Burgess and Burgess were nonresidents of the State of Indiana.

The affidavit in garnishment contained the same allegations as to the cause of action, as to the amount of the recovery; that Robert and Charles Burgess were not residents of the State of Indiana, and that the affiant believed that William B. Gill and others (the garnishees) were indebted to said Burgess and Bur-

gess in a large sum of money, the several amounts of which affiant was unable to state. An undertaking in attachment having been filed, writs of attachment and garnishment were issued and summons served on the garnishees, and notice was given to plaintiffs by publication in a newspaper.

Plaintiffs, Burgess and Burgess, in their complaint to review, alleged that they were defaulted in said cause and had no notice of the pendency of said suit. They admit that the affidavits are sufficient as affidavits in attachment and garnishment, but insist that they are not sufficient to warrant the publication of notice to defendants in that cause, or to authorize the court to order such publication; that they do not comply with the third subdivision of section 320, Burns' R. S. 1894, providing for notice of the pendency of actions. Said subdivision reads as follows: "Where the defendant is not a resident of the State, and the cause of action is founded upon or connected with a contract, or arises from a duty imposed by law, in relation to real estate in this state, or the object of the action is to enforce or discharge a lien, or to obtain a divorce, or to try and determine or quiet the title to, or possession of, real estate or any interest therein, or to enforce the collection of any demand by proceedings in garnishment or attachment, * * * ." Appellees insist that the object being to enforce the collection of a demand by proceedings in attachment and garnishment, that fact should have been shown by the affidavit. The Supreme Court in *Field v. Malone*, 102 Ind. 251, has decided the question adversely to the claim of appellees. In that case Malone sued Field *et al.*, on account for services rendered as sheriff. At the time of the filing of the complaint an affidavit and undertaking in attachment were also filed. Subsequently on the 4th day of February, an affidavit was

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filed for notice by publication. The affidavit stated that they were indebted to him on account and for services performed by him as sheriff of Porter county, and that "the said defendants are all nonresidents of the State of Indiana." On this affidavit notice was given by publication. Afterwards, on the 24th day of February, plaintiff filed his affidavit for garnishment, and a writ was issued, and summons served on one Bartholomew (garnishee), who appeared specially, and moved to quash the notice to the nonresidents on the ground of the insufficiency of the affidavit. This motion was overruled and he appealed to the Supreme Court. The ruling of the lower court was sustained.

Elliott, J., in delivering the opinion of the court, says: "The affidavit upon which the notice of publication was ordered was not so defective as to render the notice ineffective. It states that there is a cause of action in the plaintiff against the defendants, shows that it is connected with a contract, and alleges that the defendants are nonresidents of the State of Indiana. These are the essential facts, which authorize notice by publication, and as they are embodied in the affidavit, they gave the court jurisdiction to order the publication of the notice. The statute does not contemplate a full statement of the facts constituting the cause of action in the affidavit for publication, nor is there any reason for requiring such a statement. The affidavit is not intended to inform the defendant of the particular character of the cause of action urged against him, but its purpose is to exhibit to the court such facts as show that the case is one in which it is proper to give notice by publication. No useful purpose would be subserved by setting forth the facts at length; on the contrary, such a procedure would cumber the record, and do no good at all." The court cites *Dronillard v. Whistler*, 29 Ind. 552, as laying down the

just and practical rule, and as in harmony with the view above expressed. As suggestive and instructive in this connection, see *Fremont Cultivator Co. v. Fulton*, 103 Ind. 393, and *Dunn v. Crocker*, 22 Ind. 324.

Appellees further insist that the notice as published was not sufficient to notify the defendants of the nature of the action against them. This objection is not well taken. The notice was published in the *Crawfordsville Journal*, a weekly newspaper of general circulation, printed and published at Crawfordsville, Montgomery county, Indiana, and recites the filing of the complaint, that the defendants were non-residents of the State of Indiana, and that the cause of action was for damages against defendants for breach of warranty by said defendants and deceit in the sale of a horse. The notice informed defendants of the nature of the action. They were bound to take notice that the cause of action was one in which plaintiffs would be entitled to attachment. The notice was sufficient to serve the obvious purpose to convey information to defendants of the pendency of the action and the course it was likely to take in respect to their property. Attachment and garnishment not being causes of, but incidents to actions, we do not deem it essential, in view of the decisions referred to, that the affidavits for attachment or the notice of the pendency of the suit should state that the demands were to be enforced by these auxiliary proceedings. *Excelsior Fork Co. v. Lukens*, 38 Ind. 438; *Robbins v. Alley*, 38 Ind. 553; *State, ex rel., v. Miller*, 63 Ind. 475. Besides it will be observed that the third subdivision of said section 320 states the various grounds for giving notice by publication disjunctively, making each ground a distinct cause as "Where the defendant is not a resident of the State, and the cause of action is founded upon or connected with a contract, or arises from a

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duty imposed by law," etc. It is only necessary that one of the grounds set out in the complaint should be stated. The affidavit and notice each state that the action is for breach of warranty, a cause clearly under the section authorizing notice by publication.

Counsel for appellees further contend that the judgment below should stand, because there was no judgment sustaining the attachment proceedings. The court found for the plaintiffs upon their complaint as against the defendants Burgess and Burgess, and assessed their damages at \$600.00, and found for the plaintiffs on the issue in the attachment proceedings as against Burgess and Burgess, and that they were nonresident of the State and that plaintiffs were entitled to judgment against the garnishees. A writ of attachment was issued and returned no property found. The court could not render a personal judgment against Burgess and Burgess, but rightfully adjudged the amount found to be due the plaintiffs, and rendered judgment against the garnishees for the amount owing the defendants Burgess and Burgess. The case of *Pitts v. Jackson*, 135 Ind. 251, upon which appellees rely to sustain the ruling of the lower court, holds that an affidavit for publication should state some one of the specific causes for publication named in the statute, and that the affidavit in question was defective for the reason that it failed to state any of the statutory causes. The correctness of the decision cannot be questioned. It cites *Field v. Malone*, *supra*, without criticism, and we must hold it is still authority.

What we have said sufficiently indicates the view of the court upon the controlling questions discussed by counsel, and we do not deem it necessary to prolong this opinion by the consideration of the other alleged errors for which appellees asked for a review

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of the judgment. Judgment reversed, with instructions to the trial court to sustain the demurrer to the complaint.

Black, J., dissents.

Robinson, J., took no part in this decision.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD
COMPANY v. AMOS.

[No. 2,257. Filed March 15, 1898. Rehearing denied June 9, 1899.]

APPEAL AND ERROR.—*Bill of Exceptions.*—*Motions.*—A motion to make a complaint more specific must be set out in the bill of exceptions in order to become a part of the record on appeal. p. 379.

MASTER AND SERVANT.—*Negligence.*—*Damages.*—*Special Verdict.*—*Sufficiency.*—A special verdict in an action by a section hand against a railroad company for damages for injuries sustained while breaking stone for defendant which finds that the handle of the hammer furnished him by defendant was made of a hickory pole with the bark on, and was worm-eaten and defective, and by reason of such defects broke and caused the hammer to glance and thus cause a piece of the stone to fly toward plaintiff and strike him in the eye, wounding the eye and destroying the sight, is sufficient to sustain a judgment for plaintiff. pp. 379-382.

SPECIAL VERDICT.—*Ultimate Facts.*—*Practice.*—The question as to the manner in which plaintiff received an injury is one of fact to be found by the jury, and such conclusion will not be disturbed under a motion for a judgment on the verdict. pp. 382, 383.

SAME.—*Weight of Evidence.*—Where there is evidence tending to support the findings in a special verdict the Appellate Court will not disturb the verdict on the sufficiency of the evidence. p. 383.

APPEAL AND ERROR.—*Interrogatories to Jury.*—*Objections to Form of.*—*When Made for First Time on Appeal.*—Objections to interrogatories to the jury filed with the special verdict on the ground that they were not so framed that the jury in answering them should answer as to a single fact only will not be considered on appeal under a motion for judgment upon the verdict, where no such objection was presented in any form to the trial court. p. 383.

From the Jennings Circuit Court. *Affirmed.*

McMullen & McMullen, for appellant.

T. C. Batchelor and G. H. Batchelor, for appellee.

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BLACK, J.—The appellee's complaint against the appellant was held sufficient on demurrer. The objections urged against the complaint, in argument relative to this ruling, assail the pleading for want of definiteness rather than for failure to state a cause of action. Upon motion it was made more definite in some respects. The motion to require it to be made more definite having been renewed, it was overruled, and this ruling is assigned as error. But in the bill of exceptions by which it was sought to save this matter, the written motion stating wherein it was sought to have the pleading made more specific was not set out. In the place where it should have been copied into the bill, a reference is made to another part of the transcript where it is inserted by the clerk. Not being a part of the record, though thus in the transcript, the motion showing in what respect it was desired to have the complaint made more specific could not be brought into the record by a reference in the bill of exceptions. This has been decided frequently. See *Colee v. State*, 75 Ind. 511, and authorities there cited. There was a special verdict, upon which the court rendered judgment for the appellee.

In the special verdict the facts were found substantially as follows, omitting mere preliminaries: The appellee, on the 5th day of February, 1894, was in the employ of the appellant, as a section hand on its railroad, and as such employe was subject to the appellant's control. The appellant by its section foreman ordered the appellee to break stone for the appellant with a certain hammer, which was furnished by the appellant, and was fitted with a wooden handle, made of a hickory pole with the bark on it. The handle was worm-eaten and decayed under the bark, and by reason of its worm-eaten and decayed condition rendered weak and unsafe for use. It had been cut

for several years. It was found that the appellant, by the use of ordinary, diligent inquiry could have learned prior to said day that said handle had been cut for so long a time as to render it unsafe for use, and that it is a fact that hickory poles, when cut green, the bark being left on, become decayed and worm-eaten, and are thereby rendered liable to break. It was also stated that the appellant, by a reasonable, prudent and careful inspection of said handle could have ascertained, before furnishing it to the appellee, that it was decayed or worm-eaten and unfit for use. While appellee was breaking stone with said hammer for the appellant, in the usual and ordinary way of doing such work, on said day, the handle broke near the hammer. When it broke, the appellee was breaking stone by striking the stone with the hammer, using no more force than was proper and necessary to break the stone. The breaking of the handle caused the hammer to glance, and thus caused a piece of stone to fly toward appellee and to strike him in the right eye, wounding the eye and destroying the sight thereof. The particulars of the consequent damage were set forth, and the sum of \$3,000.00 was found to be a reasonable compensation for the injury.

It was stated by the jury that the appellee was wholly ignorant of the faulty, decayed and worm-eaten condition of the handle, up to the time it broke; that he had no opportunity to learn, by the use of ordinary diligence and care, of the decayed and worm-eaten condition of the handle before it broke.

It was further found that the appellee had not used the hammer with the same handle before the day he was injured; that the handle was put into the hammer the day before by "the employes;" that the appellant furnished the handle; that it originally came from the

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woods; that it was one that the appellant had kept in stock; that the appellee did not have the same opportunity to inspect the handle that the appellant had, and did not have more opportunity than the appellant to inspect and examine it. There were statements of other material facts and of mere conclusions of law, which we need not recite.

It is the duty of a master who employs a servant to work with tools furnished by the former to exercise ordinary care and diligence, in providing such tools, to furnish tools which will be safe for the servant in the use thereof about the master's business pursuant to the contract of employment. It is also the master's duty toward the servant to exercise a reasonable supervision over such tools and to exercise ordinary care to keep them in safe condition for the use of the servant. He cannot divest himself of responsibility by delegating the performance of such duties to agents or other servants.

The master is required to take notice not only of the deterioration of tools and appliances by continued use, but also of such deterioration by natural or ordinary decay as may be discovered by reasonable inspection, in any material which may be provided by him as tools or as parts thereof.

The servant has a right to rely upon the master's observance of these requirements and performance of these duties. The servant impliedly assumes the risk ordinarily and naturally incident to the particular service in which he voluntarily engages as a servant, and he is bound to exercise ordinary care for his own safety in the use of the implements so provided. If he is injured because of his own want of such care he cannot recover of the master because of contributory fault; and if he is injured, though without want of due care on his part, yet without any fail-

ure of the master to perform such duties on his part, the injury is to be regarded as one the risk of which was assumed by the servant.

But the duty of inspection does not lie equally upon the master and the servant; for the servant has the right to assume that the master has so performed his duty that the servant may rely upon the safety of such implements provided by the master, unless their defectiveness is open to the observation of ordinarily prudent men; in which case the servant cannot so rely upon their safety, and if he voluntarily continues to use them in such condition, he assumes the additional risk. The implied undertaking of the master is, not that the implement is absolutely free from danger in its uses, but that according to its kind it is sound and fit for the use to which it is to be put, so far as ordinary care and prudence can discover, and that he will exercise ordinary care and prudence to keep it in such condition.

These legal propositions are so elementary and are so often stated in substance in the reported decisions of our own State, that this repetition of them may seem unnecessary. They are the legal doctrines applicable to the facts of this case.

Applying them to the special verdict, we have concluded that there was no error in rendering judgment for the appellee upon the verdict.

It is very strongly urged in behalf of the appellant that it does not sufficiently appear that the appellee's injury was caused by the breaking of the defective handle. It is, in effect, claimed that it cannot be regarded as consistent with sound reason to find that the breaking of the handle, in the manner described, could be the true cause of the flying of the stone in the direction in which it was caused to go by the hammer.

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It is a question of fact, and not one of law. This court cannot determine that it was an impossibility in the nature of things for the injury to occur as found by the jury. It was for the jury to state the ultimate fact without the mere evidence upon which it was decided; and we are unable to disturb the jury's conclusion, but must assume it to be correct when considering it under a motion for judgment.

Upon the question as to the sufficiency of the evidence, the argument of counsel relates to matters within the province of the jury and the trial court rather than of this court. It was for the jury to determine what weight should be given to the testimony of the several witnesses, and there having been evidence tending to prove the findings, we cannot interfere on the ground of want of sufficiency of the evidence.

Some objection has been suggested to certain interrogatories in the special verdict, on the ground that they were not so framed that the jury in answering them should answer as to a single fact only. Counsel have not referred to any part of the record showing that such objection was presented in any form to the trial court, and in our examination of the record we have not observed any suggestion of that matter to the trial court. The question does not arise under the motion for judgment upon the verdict. Being first suggested in argument here, we cannot regard the imperfection, if any, as available error.

Objections have been urged against some of the instructions given by the court to the jury. Upon a consideration of all the instructions taken together, we are unable to regard the particular instructions criticised as properly subject to the objections urged against them, the discussion of which by us would not serve any useful purpose. The judgment is affirmed.

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[No. 2,494. Filed June 10, 1898.]

BILLS AND NOTES.—*Assumption of Payment of Note.*—*Parties.*—The makers of a promissory note may by an equity proceeding require the payee thereof to proceed against one who has for a valuable consideration assumed the payment of such note. pp. 386, 387.

PRACTICE.—*Joinder of Causes.*—*Parties.*—*Bills and Notes.*—The maker of a promissory note cannot by cross-complaint in an action against himself on such note cause one who has agreed with him for a valuable consideration to assume the payment of the note to be made a defendant, and in such action have judgment against him on his cross-complaint for the amount of the note under the provision of section 1226, Burns' R. S. 1894, that, "When any action is brought against two or more defendants upon a contract, any one or more of the defendants being surety for the others, the surety may upon written complaint to the court, cause the question of suretyship to be tried and determined upon the issue made by the parties at the trial of the cause or at any time before or after the trial, or at a subsequent term." 388-390.

From the Carroll Circuit Court. *Reversed.*

John C. Nelson and Quincy A. Myers, for appellant.

L. D. Boyd and M. A. Ryan, for appellees.

WILEY, J.—Appellees, Abner T. and Edward W. Bowen and John A. Cartwright, under the firm name of A. T. Bowen & Co., sued appellees, James H. Hinkle and Josiah Appleton, on a note executed by them to said firm. The payers of the note appeared and filed a cross-complaint, making the payees and appellant, Anthony Hinkle, cross-defendants. Summons was issued on the cross-complaint, and Anthony Hinkle brought into court. The substance of the cross-complaint was that the note sued on was given for money borrowed of A. T. Bowen & Co. by James H. Hinkle; that Appleton was surety thereon; that after the borrowing of said money appellee, James H. Hinkle, deeded to appellant a tract of land in Carroll county,

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Indiana; that, as a part of the consideration for said transfer, appellant assumed and agreed to pay certain indebtedness of James H. Hinkle, including the note sued on, and that said appellant was put in possession of said land. The prayer of the cross-complaint was that in case of a judgment against the cross-complainants, on the note, that appellant be adjudged the principal thereon, and that his property be first exhausted in satisfaction thereof. Appellant's demurrer to the cross-complaint was overruled and he excepted. Appellant answered the cross-complaint in five paragraphs, but as no question is presented for determination under the answer, we need not refer to it further. To the affirmative paragraphs of this answer to the cross-complaint the appellees, Hinkle and Appleton, filed their reply in general denial. The appellees, A. T. Bowen & Co., filed an answer in general denial to the cross-complaint, and appellees, Hinkle and Appleton, filed an answer to the complaint in general denial. Upon these issues the cause was submitted to the court for trial, with a request that the court make a special finding of facts and state its conclusions of law thereon. The court found the facts specially and stated its conclusions of law that there was due from appellees, Hinkle and Appleton, to A. T. Bowen & Co. upon the note sued on \$273.33, as principal and interest, and \$47.33 as attorney's fees, and that appellant was liable to appellees, Hinkle and Appleton, for the full amount due from them to A. T. Bowen & Co.

To each conclusion of law appellant excepted. He then moved for a *venire de novo*, for a new trial, and in arrest of judgment, which motions were respectively overruled. The judgment rendered was that the appellees, A. T. Bowen & Co., recover of appellees,

Hinkle and Appleton, the amount found due, together with costs, and that appellees, Hinkle and Appleton, recover of appellant on their cross-complaint, a like amount, with costs, etc.

There are ten specifications in the assignment of errors, but we need not refer to but two of them, viz: (1) That the court erred in overruling appellant's demurrer to the cross-complaint. (2) That the court erred in each of its conclusions of law.

Appellant insists that the cross-complaint was not sufficient to withstand the demurrer, and the objections urged against it are two-fold: (1) That to entitle an alleged surety to the relief granted by statute, the original action must be one based upon a contract, in which, at its inception, the relation of principal and surety, on the contract sued on, existed, and that the action must be one against both the principal and surety. Here the original plaintiffs did not join appellant as a party. He was, in fact, as between the original payees of the note and himself, an entire stranger to the contract sued on. He was not a necessary or even a proper party to the action on the original contract. True, the payees of the note might have elected to proceed against the appellant on his assumption and agreement with James Hinkle and Josiah Appleton, to pay the debt evidenced by the note sued on, for by that assumption he became an original debtor, but they did not so elect. That he did become an original debtor, and primarily liable as such, there seems to be no doubt, and the authorities so hold. His liability, however, as an original debtor, arose by reason of his assumption of the debt, and his agreement to pay it, and not by reason of the terms of the note in question. His assumption of the debt did not change the relations existing between the

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original payees and payers, and while the original payers might have proceeded in equity to compel the payees to collect the debt from the appellant, they did not do so, and hence the payees, as was their right, sought their remedy by suit on the original contract.

That the original payees might thus have proceeded, see 24 Am. and Eng. Ency. of Law, 789, and cases there cited; *Huffmond v. Bence*, 128 Ind. 131; *Brandt on Suretyship*, sections 191, 192, 193; *Philadelphia, etc., R. R. Co. v. Little*, 41 N. J. Eq. 519. Here the payees of the note brought their action against the payers, and by a cross-complaint the payers seek to bring appellant into court for the purpose of having determined, in the same action, their relative rights and positions to the debt contract.

It seems to us that this is wholly a collateral matter to the main action, and has no legitimate connection with it. In *Fensler v. Prather*, 43 Ind. 119, this principle was thoroughly discussed, and the statutory provisions relating to the rights of sureties reviewed. Sections 1224-1226, Burns' R. S. 1894 (1210-1212, Horner's R. S. 1897), is as follows: "When any action is brought against two or more defendants upon a contract, any one or more of the defendants being surety for the others, the surety may upon written complaint to the court, cause the question of suretyship to be tried and determined upon the issue made by the parties at the trial of the cause, or at any time before or after the trial, or at a subsequent term; but such proceedings shall not affect the proceedings of the plaintiff." Sections 1224 (1210), *supra*, provides the manner in which a surety may notify his creditor or obligee to proceed at once upon his contract against the principal. Section 1225 (1211), *supra*, provides upon what conditions the surety may be discharged.

In the case before us, James Hinkle and Josiah Appleton seek by their cross-complaint to have appellant declared the principal debtor under his assumption, and they his sureties. It is evident that they are not seeking relief under the last two sections of the statute referred to, for they did not give notice requiring the original payees to proceed against him. Hence if they are entitled to any relief under the averments of their cross-complaint it must be by virtue of section 1226 (1212), *supra*. It seems clear to us that under that section they are without remedy. The express provision of the statute is that, "When an action is brought against two or more defendants upon a contract, any one or more of the defendants being sureties, etc., the surety may have the question of suretyship determined, etc." The relation of principal and surety to the contract must originally have existed, to bring the surety within the provisions of the statute, and so it has been directly held.

In *Fensler v. Prather*, *supra*, it was said: "The right of a surety thus to require the creditor to sue on the contract, or if he does not the surety will be discharged, is statutory, and it is right that it shall only be exercised in those cases which come fairly within the statute. *Halstead v. Brown*, 17 Ind. 202. We think it may be laid down as a general rule, that to entitle a party to proceed under the statute in question, he must have been a surety at the inception of contract. We will not say that the rule may not have exceptions, but none occur to us now. The language of the statute as to the persons who may have the remedy is, 'any person bound as surety upon any contract in writing,' etc. The contract here referred to is intended to be the original contract by which the parties become bound to the payee or obligee, and not a subsequent contract between the principal makers

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of the instrument, to which the payee or obligee is not a party. It means a contract by which the surety is bound to the payee or obligee as surety, and not one in which he was and is bound to the payee or obligee, as one of the principal joint makers or obligors in the contract. Such, we think, is the clear sense of the language used." See, also, *Boys v. Simmons*, 72 Ind. 593. In this case the appellant was not a party to the original action, and the action was not brought upon a contract, in which he was either principal or surety. In the contract itself there was no privity of interest, or liability, between him and the appellees, Hinkle and Appleton, and hence under the statute, as the relation of principal and surety did not exist in the inception of the contract, the appellees, Hinkle and Appleton, were not entitled to the relief prayed for in their cross-complaint.

(2) As the cross-complainants were not entitled to have the question of suretyship determined in the main action, for the reasons just given, they did not by their cross-complaint bring themselves within the statutory provisions for the relief of sureties. It seems to us that their remedy is payment of the debt, and then if appellant, upon demand, refuses to comply with his agreement and reimburse them, they would have their common law right of action against him, as for money paid, or a right of action on his assumption of the debt, and his express agreement to pay it. As they have neither brought themselves within the statute, or the common law right, it follows that their cross-complaint does not state any cause of action. While the policy of the law is to avoid a multiplicity of suits, yet, where litigants desire to avail themselves of such a wholesome policy, they can only do so within reasonable limits, and when they

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bring themselves within the well defined rules upon which the policy rests.

The court erred in overruling the demurrer to the cross-complaint, for which the judgment as against appellant must be reversed. But in the reversal of the judgment, the rights of the appellees, Bowen & Co., should not be affected. It is unnecessary for us to state the facts found by the court. It is sufficient to say that ample facts were found upon which the court stated its first conclusion of law, that appellees, A. T. Bowen & Co., were entitled to recover against the appellees, Hinkle and Appleton, the amount due on the note, etc., and the judgment in their favor is affirmed.

The cross-complaint not having stated any cause of action, the facts found upon the issues joined thereon would not entitle appellees, Hinkle and Appleton, to a judgment in their favor against appellant. The judgment, therefore, as to appellant, is reversed, with instructions to the court below to sustain appellant's demurrer to the cross-complaint, and for further proceedings not inconsistent with this opinion.

THE STATE, EX REL. DOOB, *v.* BERGNER ET AL.

[No. 2,472. Filed June 14, 1898]

MORTGAGES.—Sale of Mortgaged Chattels on Execution.—Liability of Officer.—A constable who sells mortgaged chattels on an execution against the mortgagor, and delivers the same to the purchasers without requiring a compliance with the terms of the mortgage, is liable only for nominal damages, where the chattels were not removed from the county and were within a short distance of where the mortgagee lived.

From the Lake Circuit Court. *Affirmed.*

Ibach & Ibach, for appellant.

F. N. Gavit and *T. S. Fancher*, for appellees.

The State, ex rel. Doob, v. Bergner et al.

ROBINSON, J.—There is in this record but one question, the solution of which depends upon the law applicable to the following facts: In April, 1890, it appears appellee, Bergner, duly qualified as a constable, with his co-appellees as sureties on his bond; that he regularly appointed William Emmel his deputy, and at the times hereinafter mentioned said Emmel was a duly qualified and acting deputy constable; that in March, 1893, one William Burnett was indebted by notes to the relator, and to secure the same executed a chattel mortgage which was recorded as the statute provides; that under the conditions of the mortgage the mortgagor was to retain possession of the mortgaged property until the notes became due or until the mortgagee felt himself insecure, or if the property should be levied upon by virtue of an execution or any writ from any court then the mortgagee should have the right to take immediate and unconditional possession of the same for his own use; that on the 27th day of October, 1893, one August Wuestenfeld commenced suit against said Burnett before a justice of the peace, and filed his affidavit and bond in attachment; that a writ of attachment was issued, and on said day said Emmel levied the same on the property described in the mortgage, and took the same into his possession, and removed it from the place where Burnett had it stored; on January 5, 1894, judgment was rendered against Burnett in favor of Wuestenfeld for \$51.65 and costs, and the attached property ordered sold, the same being the said mortgaged property; on the 31st day of January Emmel sold the property to divers persons, all of whom were to the relator unknown, and delivered to the purchasers said property without complying with the terms of said mortgage; that on January 10, relator informed Emmel that he had a chattel mortgage on said prop-

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erty, and from thence forward the mortgagee knew that the constable had all of said property unsold and in his possession under levy; that when said property was levied on the mortgage became entirely due and payable; that said Emmel did not sell said property in gross to one person, but article by article, to various persons who lived in the same county with the relator, and all within one quarter to one mile from where relator lived, and with one or two exceptions all lived at the same places when this suit was brought; that the relator at no time knew to whom said Emmel delivered said property except some chairs valued at \$3.00; that relator knew of the day, when, and time and place where, said sale was to be held; that on the day of the sale said property was worth \$75.00, and there was due and unpaid on said notes secured by the mortgage, \$160.00, which is still due relator; that the purchase money on said sale was applied on said judgment.

The court stated as conclusions of law, that by delivering said property to the purchasers without requiring them to comply with the mortgage, appellee, Bergner, committed a breach of his official bond, that as a result of such wrongful acts of Bergner the relator sustained damages in the sum of one cent, and that relator should recover of appellees one cent damages and one cent costs.

Section 734, Burns' R. S. 1894, provides that, "Goods and chattels pledged, assigned, or mortgaged as security for any debt or contract may be levied upon, and sold on execution against the person making the pledge, assignment, or mortgage, subject thereto, and the purchaser shall be entitled to the possession, upon complying with the conditions of the pledge, assignment, or mortgage." Under this statute the officer is entitled to the possession of the property mortgaged

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as against both the mortgagor and mortgagee for the purpose of selling it on an execution. *Landers v. George*, 49 Ind. 309; *Olds v. Andrews*, 66 Ind. 147; *Sparks v. Compton*, 70 Ind. 393.

The record of the mortgage was notice to the officer that there was a lien on the property of the attachment debtor prior to the lien of his writ. He must be held to have known that a liability had accrued to the relator under the terms of the mortgage, and that the relator had the primary right to possession of the property. He had nothing to do with the validity of the mortgage but to treat it as a valid lien. He had the right to the possession of the property, and had the right to sell it, but he could not give the purchasers possession of the property until the terms of the mortgage had been complied with because the statute expressly forbids him to do so. He did sell it, and gave the purchasers possession but failed to require the purchaser to comply with the conditions of the mortgage, and for this breach of duty he became liable on his bond.

But upon the facts the trial court was right in assessing damages in a nominal sum only. It cannot be presumed that the property, simply by delivering its possession to the purchasers, was necessarily materially injured, or that its value as a security for the mortgage debt had been diminished. The burden was on the relator to show such facts as would entitle him to substantial damages. There is no finding that shows that the property was injured, or that its value as a security has been impaired, but on the other hand the finding shows that after the sale, and when this suit was brought, the property was still within the county, and within a short distance of where relator lived. As soon as the levy was made the relator, under the mortgage, had the right to the immediate posses-

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sion of the property. For about three weeks before the sale he knew that the levy had been made, and that the property was in the possession of the officer. For some reason he did not take possession, but permitted the property to be sold. The sale did not divest his lien, and for aught that appears the property was as valuable as a security for his debt after the sale as it was before. He does not show that his security had been lost by the acts of the officer, or that its value has been necessarily diminished. ♣

In the case of *Collins v. State, ex rel.*, 3 Ind. App. 542, cited by counsel, it appeared that the officer had sold the mortgaged goods and delivered them to the purchasers, who immediately took the same out of the county and converted them to their own use, and that they became wholly lost to the mortgagees, and the officer was held liable on his bond for more than nominal damages. But the facts clearly distinguish that case from the case at bar.

In the case of *Slifer v. State, ex rel.*, 114 Ind. 291, a constable sold mortgaged chattels and delivered possession to the purchasers without the conditions of the mortgage having been complied with. It does not appear whether the purchasers took the goods away, nor is there anything to show what was done with them. The court held that as the finding failed to show the value of the property, and nothing being found to indicate that the property had been materially injured or that its value as a security for the mortgage debt had been diminished by its delivery to the purchasers, a case was not made for more than nominal damages. See, also, *McDaniel v. State, ex rel.*, 118 Ind. 239. Judgment affirmed.

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THE CITY OF COLUMBIA CITY v. LANGOHR.

[No. 2,553. Filed June 14, 1898.]

CITIES.—Damages for Personal Injuries.—Negligence.—Special Verdict.—Plaintiff brought suit for a personal injury received while walking along a board sidewalk. The jury found in the special verdict that the boards were from culled lumber and were nailed cross-wise on stringers; that plaintiff was walking along the sidewalk with her sister, carrying a babe in her arms, walking slowly and carefully, and observing the sidewalk as she proceeded; that she tripped on a loose board in the sidewalk by reason of her sister stepping on the other end thereof and fell, dislocating her thumb, elbow, and shoulder, and also injuring her back; that the boards had become loose by reason of the nails having rusted off, and had been loose for five months; that defendant could have discovered the defective condition of the sidewalk by inspection, and that plaintiff did not know that the walk was out of repair, and could not, by the use of ordinary care, have discovered that there were loose boards in the walk. *Held*, that the facts found by the special verdict were sufficient to support a judgment for plaintiff. *pp.* 396-400.

DAMAGES.—Special Verdict.—Conflict in Findings.—The jury in an action for damages for personal injuries assessed plaintiff's damages at \$1,000 as compensation for her present condition of health, as well as for injuries sustained from an accident, as charged in the complaint, which injuries included the dislocation of her shoulder. The jury found that the injury to her shoulder was permanent, and that her present condition of health was occasioned solely by the accident described in the complaint, and then found that the shoulder subsequently became dislocated, without stating the cause thereof. The jury also found that if the dislocation had been properly reduced and placed in an immovable position it could not have become dislocated, but it was not found whether or not it was or should have been placed in an immovable position. *Held*, that the statement of the jury that they included in the assessment of damages compensation for the present condition of plaintiff's health as well as for her injuries from the accident described in the complaint may be regarded as not inconsistent with the conclusion by the jury that her present condition was occasioned solely by the accident described in the complaint. *pp.* 400-403.

EVIDENCE.—Weight of.—The Appellate Court will not weigh the evidence for the purpose of determining its preponderance. *p.* 403.

From the Whitley Circuit Court. *Affirmed.*

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Thomas R. Marshall, Wm. F. McNagney and P. H. Clugston, for appellant.

A. A. Adams and E. K. Strong, for appellee.

BLACK, J.—The appellee, Rosa Langohr, brought her action against the appellant to recover damages for a personal injury suffered by the appellee. There was a special verdict, on which the court rendered judgment for \$1,000.00 in favor of the appellee, a motion by the appellant for judgment in its favor upon the verdict having been overruled.

In the special verdict it was, in substance, found as follows, omitting many details for the sake of brevity: On the 7th of May, 1896, the appellee was walking eastward on a sidewalk which ran along the north side of Market street, in Columbia City, being a part of said street. It was a board sidewalk about four feet wide, constructed on stringers running parallel with the street, the boards, which were from culled lumber, being nailed cross-wise on the stringers. As to whether it had been built more than five years the jury said there was no evidence. The appellee was injured by falling on said sidewalk on said day. The appellee fell by being tripped by a loose board in the sidewalk, by reason of her sister's stepping upon the end of a loose board, which was loose on account of the nails holding it to the stringers having become rusted off. It had been loose continuously for five months prior to the day of the injury. There were two or more loose boards in the sidewalk at the point where she was injured, which had been loose continuously for five months. Said loose boards were dangerous to persons passing on the sidewalk. The south edge of the sidewalk at that place was lower than the north side. During four or five months prior to the injury the loose boards at that point slipped southward off the north stringer, and several times prior to the in-

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jury were placed back in position by persons walking on the sidewalk. When the loose boards were slipped to the south the defective condition of the sidewalk was plain and obvious. When they were in line and straight in their place on the walk no defect therein by reason of loose boards could be detected by simply looking at the walk, nor could such defect be detected by persons using the sidewalk except by stepping upon the loose boards. These loose boards were straight and in line, and in their place on the sidewalk at the point where the appellee was injured at the time of the injury. They had at one time been fastened to the stringers with nails or spikes. The jury stated that there was no evidence as to the time prior to the injury during which the nails or spikes had been rusted off. For five months prior to the injury the appellant permitted and suffered the walk at the point where the appellee was injured to be and become out of repair and dangerous to persons carefully using it. The appellant, by its officers or agents, inspected the sidewalk in October, 1895, but did not inspect it after that time until after the day on which the appellee was injured. The appellant could have discovered loose boards in the sidewalk at the point where the appellee was injured, if by its officers or agents it had inspected the sidewalk at any time during five months prior to the injury to the appellee. The appellee was accompanied by her sister, the appellee walking upon the south side of the sidewalk by the side of her sister, who was walking on the north side. The appellee was carrying in her arms a child about two months old. She was walking slowly, carefully, and cautiously, and was looking at and observing the sidewalk as she proceeded. She did not know before the injury that the sidewalk was out of repair at the point where the accident occurred, or

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that there were loose boards in the sidewalk at that point. The jury answered that the appellee by the use of ordinary care, prudence and observation, could not have discovered that there were loose boards in the sidewalk at the place where she was injured, before stepping upon them. She received injuries by tripping and falling upon the sidewalk, her injuries embracing a dislocated left thumb, a dislocated right elbow, a dislocated right shoulder. Her back also was injured. Her right arm was bruised, torn and lacerated. She fell upon her right side and shoulder. In consequence of the accident she suffered great pain, and was not able to lie down in bed for about six weeks after the accident. At the time of the trial she still suffered pain from the injury. She had recovered the full use of her thumb and elbow, but not of her shoulder. The jury found that the injury to her shoulder was permanent, and that she would never recover the full use thereof. She had become nervous in consequence of the injury, and her general health had been impaired by the injury. She could not raise her right arm higher than her shoulder. It was found that by reason of the injuries complained of in the complaint she had been damaged in the sum of \$1,000.00; that her condition of health at the time of the trial was occasioned solely by the accident described in the complaint; that she had not contributed to that condition of her health by the improper use of her arm; that the dislocation of her shoulder was properly reduced in the first instance by Dr. Williams; that the shoulder subsequently became again dislocated; that if the dislocation of the shoulder had been properly reduced and placed in an immovable position it could not have become redislocated without the interference with the bandages upon the part of the appellee or her attendants; that

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if the dislocation of her shoulder, as described in the complaint, had been properly reduced and bandaged shortly after the accident and subsequently received proper treatment, the appellee probably would have recovered the full use of her arm; that the second dislocation of her shoulder retarded her recovery and aggravated the injury received by her from the accident, and contributed to her condition at the time of the trial; that it did not account for the sore, inflamed, and thickened condition of the muscles and tendons in the region of the original dislocation, existing at the time of the trial; that the condition then of her shoulder had not been caused partially by her indiscreet use of her arm.

It was further found, that the walk upon which she was injured was clearly out of repair at the time of the accident; that such defective condition was not easily apparent to a person of ordinary prudence; that it was necessary to carefully inspect it before a person of ordinary prudence could have discovered its defective condition; that the appellant had not actual notice of the defective condition of the sidewalk at the time of the accident; that it had not then or prior to that time been notified of said defective condition; that the sidewalk had been repaired within two or three days before the accident by one Frederick Bush and his son, who then carefully went over and inspected the sidewalk, with a view to ascertaining what its condition was as to containing loose boards; that they did not nail down all boards on the sidewalk which by careful inspection they could discover were loose thereon; that the accident to the appellee occurred the next day after the repairs so made by them; that between the time of making said repairs and the time of the accident, the defect in the side-

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walk could have been ascertained by a reasonably careful and prudent inspection thereof.

The jury being asked, "If you find that said sidewalk was defective and out of repair at the time of the accident, was such condition open or concealed?" answered, "Concealed." It was also found, that the defect in the walk which caused the accident to the appellee was not one which could be discovered by the use of ordinary care, prudence, and observation; that at the time of the accident the appellee was carrying her babe in her arms in such a way that her view of the walk directly in front of her was thereby cut off and obstructed, and by reason of having her babe in her arms she could not see the walk directly before her at the time of the accident.

The jury assessed the appellee's damages at \$1,000.00, and they stated that in this assessment they included compensation for "the present condition" of her health, as well as for her injuries from the accident described in the complaint.

Taking the verdict as a whole, and considering all the facts stated therein, it sufficiently appears that the municipal corporation did not exercise ordinary care to maintain its sidewalk in a reasonably safe condition for the use of pedestrians, and that by reason of a defective condition of the sidewalk, which but for the want of such care on the part of the city would not have existed, the appellee was injured while exercising ordinary care on her part.

The right of the appellee to recover for the injury properly attributable to the appellant's negligence was shown. It is contended, in effect, that the verdict shows that the jury did not so confine their assessment of damages, but included therein damages for a physical condition which was not, properly speaking,

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a consequence of the injury occasioned by the defective condition of the sidewalk. If this position of counsel be correct, it would follow that the verdict does not show the amount of the appellee's damages suffered by reason of the appellant's wrong, although it shows facts entitling her to substantial damages. The dispute in this regard relates to the dislocation of the appellee's shoulder by her fall, and its subsequent redislocation.

It was found by the jury that the injuries to the appellee embraced a dislocated right shoulder. Before any finding relating to a redislocation it was found that she had not recovered the full use of her shoulder; that the injury to her shoulder is permanent; that she will never recover the full use thereof; that she could not raise her right arm higher than her shoulder; that she was damaged in the sum of \$1,000.00 by reason of the injuries complained of in the complaint; that her present condition of health was occasioned solely by the accident described in the complaint; that she had not contributed to that condition by the improper use of her arm, and that the dislocation was properly reduced in the first instance.

It is then found that the shoulder subsequently became redislocated. It is not stated by what cause or under what circumstances this redislocation was occasioned. It is stated that if the dislocation had been properly reduced and placed in an immovable position it could not have become redislocated without interference with the bandages upon the part of the appellee or her attendants. It had been found by the jury that the dislocation was properly reduced. It was not found whether or not it was or should have been placed in an immovable position, or whether or not there was any negligent or improper interference

with the bandages by the appellee or any other person.

If it can be said that it may be inferred from the verdict that there was some interference with the bandages by the appellee or her attendants, it does not appear that such finding is more than a conjectural finding, and it does not appear even conjecturally what interference there was, or that there was any negligent interference or one which might not occur and be occasioned without fault of the appellee or her attendants because of some original peculiarity of the case.

The finding that she probably would have recovered the use of her arm if the dislocation had been properly reduced and bandaged, and had subsequently received proper treatment, can hardly be said to amount to more than a finding that some one or all of these hypothetical causes probably contributed; but which of them contributed or how or in what respect or on what occasion anything was done or suffered to augment the injury is not stated. There is no finding of matters of fact in relation to any of these hypotheses. It is the office of a special verdict to state facts.

Thus it does not appear what particular cause or causes occasioned the second dislocation. It retarded her recovery and aggravated the injury. She had not contributed to her condition by improper use of her arm, and her condition was not partially caused by her indiscreet use of her arm, and it is not shown directly that there was any fault of the appellee or any other person or persons in connection with the redislocation, while it is shown that at the time of the trial she was suffering from disabilities not accounted for by the second dislocation, and it is affirmatively found that her condition at the time of the trial was

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occasioned solely by the accident described in the complaint.

The statment of the jury that they included in the assessment compensation for the present condition of her health as well as for her injuries from the accident described in the complaint may be regarded as not inconsistent with a conclusion by the jury that her present condition was occasioned solely by the accident described in the complaint. To harmonize their findings this view is necessary.

The verdict being rendered by the jury by way of answering special interrogatories prepared by counsel, there is indefiniteness and obscurity in some of the findings, but not, we think, such as made it improper for the court to render judgment for the amount assessed.

The overruling of appellant's motion for a new trial is assigned as error. Under the well known rule that we cannot weigh the evidence for the purpose of determining its preponderance, we are unable to disturb the result on the ground of want of sufficiency of the evidence. Upon the trial the court permitted to be introduced and inspected by the jury a board produced by a witness as the board by which the appellee was caused to trip and fall. The objection urged here against this action of the court, being that there was no identification of the board, was not suggested in the objection made on the trial. Furthermore, this ground of objection could not be sustained for the reason that there was amply sufficient identification of the board.

In its second instruction the court charged the jury relative to the assessment of damages, that the amount should be a full and just compensation for the injury the appellee received, and no more, and then stated what might be considered in estimating such

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compensation, saying, among other things that no compensation should be allowed for increased pain, suffering, or aggravation of the injury caused by the appellee's own negligence or carelessness; "but if the plaintiff called a reputable and reasonably competent physician to treat the injury, the amount of her compensation should not be reduced by reason of any wrong treatment the physician may have given or administered, and if she followed his directions in her conduct in the use of her arm and shoulder, she cannot be charged with negligence or carelessness, even if such conduct or use were not proper and aggravated the injury."

In *City of Goshen v. England*, 119 Ind. 368, 5 L. R. A. 253, it was held that in an action for damages for a personal injury through the defendant's negligence, where it is claimed that the negligence of the plaintiff after the injury contributed to the aggravation of the injury, such negligence is matter of defense, and the burden of proving it rests upon the defendant; and an instruction to the jury was approved which contained matter so similar to that quoted above, to which appellant here objects, as to suggest that the court below copied its instruction substantially from the report of that case. The judgment is affirmed.

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[No. 2,566. Filed June 15, 1898.]

PLEADING.—*Natural Gas Lease.*—*Action on Lease.*—*Assignment of Lease.*—In an action on a natural gas lease against the assignee thereof for the recovery of the rentals under the terms of the lease the complaint is not bad for failing to set out a copy of the assignment. pp. 406, 407.

PRACTICE.—*Harmless Error.*—Error cannot be predicated upon the action of the court in sustaining a demurrer to a paragraph of complaint where the same facts were provable under another paragraph. p. 407.

NEW TRIAL.—*Ruling of Court on Pleadings.*—The rulings of the

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court on the pleadings are not causes for a new trial, and have no proper place in a motion therefor. *p. 408.*

From the Adams Circuit Court. *Affirmed.*

R. S. Peterson, for appellant.

D. T. Taylor and *R. K. Irwin*, for appellees.

WILEY, J.—Appellees leased to one Miles a tract of land in Jay county, for gas and oil privileges, which lease was in writing, and was assigned to appellant. This action was to recover the rentals under the terms of the lease. The complaint is in one paragraph, and its material averments are: That appellees leased the land to said Miles; that he assigned the same to the appellant February 22, 1896; that by the terms of the lease, the lessee bound himself to complete a well on the premises within sixty days from the date of the lease, which was February 13, 1896; that in default thereof the lessee agreed to pay appellees a daily rental of \$2.00 per day on said premises, from the date of the lease; that by the terms of said lease, the lessee was to commence a well within sixteen days; that said Miles, while he was the owner of the lease did not commence a well on said premises; that the appellant, after said lease was assigned and transferred to him, did drill a well on said leased premises, but did not complete it until May 20, 1896, and thereby failed to comply with the terms of said lease, in that he did not complete said well within sixty days, etc.

A copy of the lease is filed with the complaint as an exhibit. There are other conditions in the lease as to rentals or rather royalties, but as this action was to recover the penalty of \$2.00 per day, for failure to complete a well within sixty days, we need not refer to them.

The appellant demurred to the complaint on the ground that it did not state sufficient facts to consti-

tute a cause of action, which demurrer the court overruled, and he excepted. He then filed an answer in four paragraphs, the first of which was a general denial, and the others setting up affirmative matter in defense. The appellees demurred to each affirmative paragraph of answer, which demurrer was overruled as to the second and third, and sustained as to the fourth.

As no question is presented by the record as to the second and third paragraphs of answer, we will only notice the fourth. This paragraph of answer admits the execution and assignment of the lease, and avers that by its terms, the said Miles and his assigns, were to have sixteen days from the date of the lease in which to commence a well on the leased premises, "else said lease or contract was to be and is null and void; that said Miles or his assigns, never at any time after the date of said lease or contract took, held or had the possession of the premises, etc," and that said Miles or his assigns did not commence a well within sixteen days, nor at any other time under and by virtue of said lease.

The appellees replied to the second and third paragraphs of answer by general denial. There was a trial by the court resulting in a judgment for appellees. Appellant's motion for a new trial was overruled, and, on appeal, he has assigned errors as follows: The court erred in overruling the demurrer to the complaint. The court erred in sustaining the demurrer to the fourth paragraph of answer. The court erred in overruling the motion for a new trial.

The only objection urged against the complaint is that it avers that Miles assigned the lease in writing to appellant, and there is no copy of the assignment filed as an exhibit. This objection is not tenable. A proper averment of the assignment is made, and there

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could be no recovery against appellant, without proof of the assignment; but the foundation of the action was not the assignment of the lease, but the lease itself, and it is made a part of the complaint by copy as an exhibit. This was sufficient. The cases cited by appellant to support his contention are the following: *Peoria Marine and Fire Ins. Co. v. Walser*, 22 Ind. 73; *Sinker, Davis & Co. v. Fletcher*, 61 Ind. 276; *Williams v. Osbon*, 75 Ind. 280. The last two cases were actions against an indorser of a promissory note, upon his indorsement, and it was held that the complaint must contain not only a copy of the indorsement, but an allegation referring to it. The first case cited was an action upon a marine insurance policy. It was there urged that the policy, a copy of which was filed with the complaint, was not sufficiently identified by the reference to it in the complaint, but it was held that the complaint was not defective in that respect. The authorities, therefore, upon which appellant relies, are not in point and do not lend any aid to his contention.

The complaint was not subject to the infirmity urged, and the demurrer was properly overruled. As to whether the court erred in sustaining the demurrer to the fourth paragraph of answer, we need not decide, for if it was error, appellant was not harmed. The same facts, together with other facts, that were averred in the fourth paragraph, were provable under the allegations of both the second and third paragraphs.

It is a familiar rule, settled by an unbroken line of authorities, that where a demurrer is sustained to a pleading, and the same facts are provable under another paragraph, such ruling, though erroneous, will be regarded as harmless error. *Harlan v. Jones*, 16 Ind. App. 398; *Kniss v. Holbrook*, 16 Ind. App. 229;

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Pottlitzer v. Wesson, 8 Ind. App. 472; *Watson v. Tindall*, 150 Ind. 488; *Barnard v. Sherley*, 135 Ind. 547, 24 L. R. A. 568, 41 Am. St. 454; *Long v. Williams*, 74 Ind. 115; *Lester v. Brier*, 88 Ind. 296.

Appellant's motion for a new trial was based upon the statutory grounds that the finding and judgment were not supported by sufficient evidence, and were contrary to law. The fifth and sixth reasons assigned for a new trial were that the court erred in overruling the demurrer to the complaint, and in sustaining the demurrer to the fourth paragraph of answer. These are not recognized causes for a new trial, and have no place in a motion therefor. Appellant contends that the evidence is insufficient to support the judgment. We have examined the record and find that there is abundant evidence upon which the judgment can rest.

There is evidence showing the execution and assignment of the lease, and that neither the original lessee, or his assignor, complied with the terms of the lease, providing for the completion of a well on the leased premises within sixty days, etc. As the lease provided for a penalty of \$2.00 per day, as rental after the sixty days until the completion of a well, the proof of these facts showed such a breach of the terms of the lease as entitled appellees to recover. There is no available error in the record. Judgment affirmed.

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[No. 2,190. Filed March 17, 1898. Rehearing denied June 15, 1898.]

APPEAL AND ERROR.—*Longhand Manuscript of Evidence.*—*How Made Part of Record.*—In order that the original longhand manuscript of the evidence be made part of the record without being copied by the clerk, it must be filed in the clerk's office before being incorporated in the bill of exceptions. *pp. 415, 416.*

ATTACHMENT.—*Personal Judgment.*—*Abandonment of Attachment Proceedings.*—The rendition of a personal judgment in an attach-

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ment proceeding without adjudication of the issue in attachment amounts to an abandonment of the attachment proceeding, and the judgment stands as though no attachment had been commenced. *pp. 416-417.*

JUDGMENT.—Joint Obligors.—Common Law Rule Not Changed.—The common law rule that a judgment recovered against one of two joint debtors is a bar to an action against the other is not changed by sections 322, 323, Burns' R. S. 1894. *pp. 417, 418.*

JUDGMENT.—Joint Obligors.—Where the holder of a joint note sues a part of the joint obligors, and takes a judgment against them, the judgment merges the obligation, and bars a subsequent action against the other joint obligors; but by proceeding under section 322, Burns' R. S. 1894, he may take judgment against those served, and suggest upon the record the return of "Not found" as to those not summoned, and then by proceeding under section 323, Burns' R. S. 1894, he may have the joint obligors not found bound by the judgment in the same manner as if they had all been before the court originally. *pp. 417-422.*

From the Marion Superior Court. *Affirmed.*

F. W. Cady, T. E. Steele and Elliott & Elliott, for appellant.

George W. Spahr Gay R. Estabrook and Hez., Dailey, for appellees.

HENLEY, J.—This was an action on two promissory notes and an account, brought by appellant against appellees, as partners, doing business under the name and style of "The Fulton Fish Market." With the complaint appellant also filed an affidavit in attachment, alleging as a cause for attachment, that appellees Alice Evans and Venning P. Evans are each nonresidents of the State of Indiana. The complaint avers that the indebtedness sued upon is the joint debt of all of the defendants, and this allegation is consistent with the language of the notes made part of the complaint.

Summons was issued for appellees, and a writ of attachment issued and levied upon the property held in the name of the Fulton Fish Market. The property

levied upon being perishable, was sold at public auction under interlocutory orders of the court and the proceeds of the sales were deposited with the clerk. The moneys arising from the sale and so deposited amounted to about \$1,000. Afterward, on the 14th day of March, 1895, and before any of the other parties made defendants to the action had appeared and answered, the appellee Long confessed judgment as a joint debtor in favor of appellant for \$1,199.08, which was the amount of the debt with interest and costs. Out of the judgment against Long the principal controversy in this cause arises. The entry of judgment in the lower court was in the following language: "Comes now the plaintiff, by its attorneys, and comes also Charles R. A. Long, one of the defendants herein, as one of the partners and joint debtors of said defendant, and files his written confession of judgment herein, as such defendant and partner and joint debtor of said Fulton Fish Market Company, for the sum of \$1,199.08, with costs, and his affidavit that said debt sued on is just and owing from the defendant, Fulton Fish Market Company, to the plaintiff, the Capital City Dairy Company, and that said confession is not made for the purpose of defrauding his creditors or the creditors of said defendant, Fulton Fish Market Company, and the plaintiff having consented in writing to the rendition of judgment rendered; and it appearing to the satisfaction of the court that the debt sued for herein, and for which said confession of judgment was made as aforesaid, was and is the debt of defendant, Fulton Fish Market Company, for the payment of which said Charles R. A. Long is jointly liable with other defendants herein, not now before the court, as a partner in said Fulton Fish Market Company, the defendant, and that said debt is a debt upon contract. "The court finds that the plaintiff is entitled to have

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judgment for the sum of \$1,199.08, together with costs, against said Charles R. A. Long, as such joint debtor, and to have such judgment enforced against the separate property of said defendant, Charles R. A. Long and the joint property of said defendant Long and his joint debtors, as the partners of the said Fulton Fish Market Company, which is within the jurisdiction and subject to the order of the court: It is therefore ordered and decreed by the court that the plaintiff, the Capital City Dairy Company, recover judgment herein of and from the defendant Charles R. A. Long, as a joint debtor with other defendants in this action, as the partners of the defendant, Fulton Fish Market Company, said defendant Long being jointly liable therefor with other defendants herein, for the sum of \$1,199.08, together with all costs herein laid out and expended by the plaintiff, taxed at — dollars and — cents, and said cause is now continued as to the other defendants herein, Hiram Plummer, Venning P. Evans and Alice Evans, until Saturday, the 16th day of March, 1895, at 9 o'clock a. m. All of which is ordered, adjudged and decreed by the court."

Afterward, and at the next term of the court, the appellees other than Long appeared and filed separate answers to the complaint and affidavit in attachment. The second paragraph of the answer of Venning P. Evans was assailed by demurrer in the lower court. The demurrer was overruled, and the ruling of the lower court is assigned as error by appellant. The second paragraph of the answer of said Evans is in the following words: "For a further answer in this behalf to the complaint and affidavit in attachment, this defendant says that the said plaintiff ought not to maintain this action against him, and said attachment proceedings ought not to be sustained, for that he says the plaintiff has sued this defendant and the defend-

ants Long, Plummer and Alice Evans as upon a joint obligation against all of them, and not otherwise, and that in the prosecution of this action, heretofore, to wit, at the March term, 1895, of this court, in room 3. thereof, where it was then pending, this plaintiff took a personal judgment against the defendant Charles R. A. Long alone, upon the obligation sued on, and failed and did not have an adjudication of the attachment proceedings herein, but on the contrary, continued said cause as to the other defendants, and said cause has been continued from term to term since that time, without any judgment being rendered against this defendant, or any adjudication had of the attachment proceedings in the action. Wherefore, this defendant says that by the action of the plaintiff, the cause of action mentioned in the complaint, and declared upon in this action by plaintiff was and is merged in said judgment, and said attachment proceedings cannot now be adjudicated upon, but should be dismissed, and to that end he prays judgment for costs and all proper relief."

Upon all the issues joined, there was a trial by the court, and a finding and judgment in favor of all the appellees except Long. The finding and judgment of the lower court was in the following words: "And now comes the plaintiff, by F. W. Cady its attorney, also come the defendants Hiram Plummer, Alice Evans and Venning P. Evans, by Hez. Dailey, their attorney, and the court being sufficiently advised in the premises, finds for the above named defendants, to wit, Hiram Plummer, Alice Evans and Venning P. Evans, and that the plaintiff is not entitled to recover in this action against them, but they are entitled to recover from the plaintiff their costs in this action laid out and expended.

"The court further finds that the attachment in this

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cause should not be sustained, but that the same should be dissolved, and that said defendants should recover of the plaintiff all costs connected with or occasioned by said attachment proceedings, including all costs of garnishment proceedings.

“And the court further finds that the property levied upon by the writ of attachment herein, was, at the time of said levy, the individual property of the defendant, Venning P. Evans, and that the money now in the hands of the clerk of this court, being the proceeds arising from the sale of said property under the interlocutory orders of this court, was and now is the individual property of the defendant Venning P. Evans, and that he is entitled to the same, and to an order of this court directing the clerk to turn the same over to him or his attorney of record in this cause, discharged of any and all claims of the plaintiff under and by virtue of said writ of attachment, and that the said defendant, Venning P. Evans is entitled to recover his costs made on account of his cross-complaint herein. Lawson M. Harvey, Judge.” “And afterwards, to wit, on the 21st day of June, 1895, being the 17th judicial day of the June term, 1895, of said court, before the same honorable judge, the following proceedings were had herein: Come now the defendants Hiram Plummer, Alice Evans and Venning P. Evans, by Hez. Dailey, their attorney, and move the court for judgment on the findings in their favor heretofore made and entered in this cause, and the court, being sufficiently advised, sustains said motion.

“It is therefore considered and adjudged by the court, that the plaintiff take nothing by this its action against the defendants Hiram Plummer, Alice Evans and Venning P. Evans, and that they (said defendants) have and recover of and from the plaintiff their costs in this cause, laid out and expended, taxed at

— dollars. It is further adjudged by the court, that the attachment and garnishment proceedings herein be, and the same are hereby not sustained, but are wholly dissolved, and that the said defendants have and recover of and from the said plaintiff all costs occasioned by said attachment and garnishment proceedings, taxed at — dollars. It is further considered and adjudged by the court, that the property levied upon and under and by virtue of the writ of attachment issued in this cause, at the time of said levy, and the proceeds arising from the sale thereof under the interlocutory orders of this court, were the individual property of the defendant Venning P. Evans, and that the money now on deposit with the clerk of this court,—the proceeds of said sale—was and now is the individual property of the said defendant Venning P. Evans, as alleged in his cross-complaint, and the clerk of this court is hereby ordered and directed to turn the same over to said Evans or his attorney of record in this cause, fully discharged of any claim of the plaintiff under and by virtue of said writ of attachment, and the said Venning P. Evans have and recover of and from the plaintiff herein all costs occasioned by said levy and sale of said property under and by virtue of said writ of attachment, all of which is finally adjudged by the court,—to all of which the plaintiff, at the time, excepts. Lawson M. Harvey, Judge.”

Appellant moved for a new trial, which motion was overruled, and this ruling of the court is also assigned as error. Before passing upon the alleged error of the lower court in overruling the demurrer to the second paragraph of the separate answer of Venning P. Evans, we will dispose of the questions arising under the motion for a new trial and all other alleged errors of the lower court depending in any way upon

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the evidence for their solution. It is not necessary that we cite the long line of authorities in this court, and the Supreme Court of this State, holding that the longhand manuscript of the evidence must be filed in the clerk's office before being incorporated in the bill of exceptions, where the appellant desires the original evidence as transcribed by the official reporter to be made a part of the bill of exceptions without being re-copied by the clerk. After the longhand manuscript has been filed with the clerk, it may then be incorporated in a proper bill of exceptions, and after being so incorporated, it is ready to be presented to the trial judge for his signature and approval. It then becomes a bill of exceptions and must be filed in the clerk's office, and can then properly become a part of the record in the cause. This was the procedure which under the decisions of this State, must be strictly followed. The act of March 8, 1897, has changed this somewhat, but it is not applicable to this cause, as the record herein was filed in this court on the 23rd day of June, 1896. The certificate of the clerk in this cause shows that the longhand manuscript of the official stenographer's report of the evidence was filed in the clerk's office on the 22nd day of May, 1896, also that the bill of exceptions which contained said longhand manuscript, was filed on the 22nd day of May, 1896. Now it is certified by the trial judge as follows: "And be it further remembered, that on the 20th day of May, 1896, and within the time allowed by the court so to do, the said plaintiff came and presented to the judge of said court, this, its bill of exceptions, in said cause, containing the sworn shorthand reporter's original longhand manuscript of his verbatim shorthand notes of the evidence given and delivered in the cause, including questions and answers, the ob-

jections of counsel, and the rulings of the court in respect to the admission and rejection of evidence, and the exceptions thereto, and all proceedings upon the trial of said cause, and asked the court to sign and seal the same, and certify that it contains a full, true, complete and impartial transcript and report of all evidence given and introduced, and of all of the proceedings had on the trial of said cause, and make it a part of the record thereof, which is now accordingly done (said bill of exceptions having been examined and found to be true) this 22nd day of May, 1896, and within the time allowed by the court therefor. Lawson M. Harvey, Judge Marion Superior Court." Thus it will be seen that the longhand transcript of the evidence as made by the official reporter, was incorporated in the bill of exceptions on the 20th day of May, 1896, when presented to the judge for signature. and it also affirmatively appears from the record that it was not filed in the clerk's office until two days later. The evidence is not in the record and cannot be considered.

The demurrer to the second paragraph of the separate answer of Venning P. Evans, and the demurrer to the second paragraph of the joint answer of Hiram Plummer and Alice Evans, presented to the lower court the same question. The overruling of these demurrers by the lower court therefore presents the same question here upon appeal, and we will consider the two specifications of assignment of error which present this question together. It is contended by appellant's counsel that the answers assume to answer both the complaint and the affidavit in attachment, and that even if it were conceded that they do answer the complaint, they do not answer the affidavit in attachment. We think that if the answers are good as against the complaint in this cause, there would be

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no necessity for an answer to the affidavit in attachment. The answers set up a judgment against one of the joint debtors, such a judgment which if good as an answer to the complaint herein, would dissolve the attachment. It has been held by the courts of this State that in proceedings for attachment, an issue is presented and if there is no adjudication of that issue, and a personal judgment alone is taken, it is an abandonment of the attachment lien, and the judgment stands as though no attachment had been commenced. *Lowry v. McGee*, 75 Ind. 508; *Thomas v. Johnson*, 137 Ind. 244; *Smith v. Scott*, 86 Ind. 346; *Sannes v. Ross*, 105 Ind. 558; *United States Mortgage Co. v. Henderson*, 111 Ind. 24.

If the facts stated in the answer are true,—and they are admitted by the demurrer,—the taking of the personal judgment against Long, without an adjudication of the issue presented by the affidavit in attachment, under the authorities above cited, dissolved the attachment, and the answer setting up such facts presented a complete defense to the affidavit in attachment. We have heretofore set out in this opinion the separate answer of Venning P. Evans in full. Does it state facts sufficient to constitute a defense to plaintiff's complaint?

The statutes discussed by counsel in this cause are sections 322, 323, Burns' R. S. 1894, and are as follows: Section 322. "Where the action is against two or more defendants, and the summons is served on one or more, but not all of them, the plaintiff may proceed as follows: *First.* If the action be against defendants jointly indebted on contract, he may proceed against the defendant served; and if he recover judgment it may be enforced against the joint property of all and the separate property of the defendant served. *Sec-*

ond. If the action be against defendants severally liable, he may proceed against the defendants served in the same manner as if they were the only defendants, and may afterward proceed against those not served.

Third. If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants, if the action had been against them, or any of them alone."

Section 323. "In all cases where judgment has heretofore been, or shall hereafter be, recovered against one or more persons jointly liable on contract, but such judgment has been, or shall be, rendered only against part of the persons liable, for the reason that the others were not summoned and did not appear, the plaintiff may proceed against those not summoned and who did not appear, in the same manner as if they were alone liable, but the complaint must allege the facts aforesaid."

The common law rule that a judgment recovered against one of two joint debtors is a bar to an action against the other or to an action against both is the law now existing in this State, and section 322, *supra*, does not change the common law rule. *Archer v. Heiman*, 21 Ind. 29; *Erwin v. Scotten*, 40 Ind. 389; *Martin v. Baugh*, 1 Ind. App. 20.

But it has been held that a judgment taken against one or two joint obligors on a promissory note, which is afterward reversed or set aside, is not a bar to another action upon the note. *Maghee v. Collins*, 27 Ind. 83; *Martin v. Baugh*, *supra*; *Heckemann v. Young*, 134 N. Y. 170, 31 N. E. 513.

It cannot be said that appellant did not have the right to take a judgment against appellee Long alone, and we think he had a right to take it in the manner and form in which it was so taken. See section 322,

supra. But appellant must abide by the legal consequences of that judgment, which was final so far as the present action is concerned, and if appellant desired to subject the appellees other than Long to this judgment, an ample remedy, in derogation of the common law rule, was provided by section 323, *supra.* The case of *Erwin v. Scotten*, *supra*, covers every point in this case arising upon the construction of the statute above set out, and in our opinion, decides every point discussed adversely to appellant. The language of Buskirk, J., in delivering the opinion of the court, is clear and forcible, and leaves no room for doubt as to the meaning of the court, and after quoting the sections of the statute above referred to, he says: "Nor has the above section of the code changed the rule as it existed at common law, that a suit against one joint promisor and a judgment against him upon a joint obligation is a bar to a suit subsequently brought upon such obligation against another joint promisor, for the note is merged in the judgment.

"Under the second clause of the said section, the obligation being several, separate judgments may be taken against the defendants. Judgment may be taken against those served, in the same manner as if they were the only defendants, and the plaintiff may afterwards proceed against those not served. Where the liability is several, there may be as many separate judgments as there are persons liable, but the payment of one judgment will amount to the payment and satisfaction of the principal and interest of all the other judgments.

"Nor does the first clause of the above section contemplate that, after the plaintiff has taken judgment against the joint makers, who are served, he may have process issued against those not served, and when such new process has been served, take another judg-

ment upon such joint obligation. There can be but one judgment rendered on a joint obligation. The joint obligation can not be changed into a several obligation. When a note is several, or joint and several, each of the makers is severally liable, and separate judgments may be taken against each maker, and one may be compelled to pay the whole amount, and be driven to his action against the others for contribution. The makers of a joint note are jointly liable, and the joint property of all and the separate property of each may be sold, but their joint liability cannot be converted into a several liability, as would be the case if separate judgments should be rendered on a joint note. It should be observed that the first clause of said section does not provide any remedy against those not served, while it is provided in the second clause that where the defendants are severally liable, the plaintiff may proceed against those served, in the same manner as if they were the only defendants, and may afterward proceed against those not served. When the liability is several, the plaintiff may sue part or all of the makers, and may take judgment against part or all, at his option. This is provided for in the third clause of said section. That clause provides, that, 'if all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants, if the action had been against them or any of them alone.' The plain and obvious meaning of the third clause is, that when the plaintiff may sue a part or all of the makers, he may take judgment against either or all of the defendants, and this can only be done when the liability is several, or joint and several. When the liability is several, or joint and several, the plaintiff may take judgment against those served, and

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have entered on record a suggestion of 'not found' as to those not served, and may continue the cause as to them for process, and may, at a subsequent term, take a separate judgment against them, or he may dismiss the action as to any of the defendants, whether served or not served, and afterward may commence another action against them and take another judgment against them. This is provided for by section 42 of the code.

"But no such remedy has been provided where the liability is joint only. Section 641 of the code has provided another and different remedy, and one that is in entire harmony with the first clause of section 41 of the code. Section 641 reads as follows: 'When a judgment shall be recovered against one or more persons jointly indebted upon contract as provided in section 41, those who were not originally summoned to answer the complaint may be summoned to show cause why they should not be bound by the judgment in the same manner as if they had been originally summoned.' 2 G. & H., p. 297."

We have been unable to find any decision in this State which doubted or criticised the law as above laid down, but on the contrary the case of *Erwin v. Scotten, surpa*, has been cited with approval often by the Supreme Court and by this court. Sections 322 and 323, *supra*, of the statutes furnish a complete remedy, when construed together, against those jointly indebted, without changing the joint liability of the makers, and if the holder of a joint note sues a part of the joint obligors and takes a judgment against them, the judgment merges the obligation, and bars a subsequent action against the other joint obligors, but by proceeding under section 322 he may take his judgment against those served and suggest upon the record the return of "not found" as to those

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not summoned, and then by the proper proceeding under section 323 he may have the joint obligors "not found" bound by the judgment in the same manner as if they had all been before the court originally. We are satisfied that the court did not err in overruling the demurrers to the separate answer of Venning P. Evans, and the joint answer of Hiram Plummer and Alice Evans. We have carefully considered all the questions argued by appellant's counsel, and presented by the record, and find no error for which the judgment should be reversed. Judgment affirmed.

MOODY ET AL. V. THE STANDARD WHEEL COMPANY.

[No. 2,486. Filed June 16, 1898.]

SALES.—Contracts.—Orders.—Plaintiff sued defendant for the value of a car load of spokes. It was found by the special verdict that plaintiff sold defendant a car load of spokes in 1895, and another in 1896, which were paid for. A short time after the latter sale plaintiff wrote defendant, "We have a car load of spokes on hand now. If you want them, send a man over and take them up, and we will pay his car fare to Ft. Wayne. Let us hear from you by return mail." Defendant replied, "Your favor of the 28th inst. is received, but, as we are chuck full of cheap spoke stock, we will not be able to use yours just now. We think, however, that we can do so after September 1st." About a month thereafter defendant wrote plaintiff that owing to a depression in business they would discontinue all purchases of wheel material "and will not accept any after September 1, 1896. If you have any stock manufactured upon our order, please deliver same before that date." *Held*, that the correspondence did not amount to a sale nor show that plaintiff had a standing order of sale. *pp.* 423-427.

SPECIAL VERDICT.—Practice.—Contracts.—Sales.—It is the duty of the jury in an action on a contract of sale to find in the special verdict the facts in relation thereto, and it is for the court to say whether a contract was entered into. *p.* 425.

From the Allen Superior Court. *Affirmed.*

W. Leonard and E. Leonard, for appellants.

William P. Breen and John Morris, Jr., for appellee.

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ROBINSON, J.—Appellants sued appellee for the value of certain oak and hickory spokes alleged to have been delivered by appellants to appellee. It appears from the special verdict that appellants had sold appellee a car load of spokes in November, 1895, and another car load in March, 1896; that these were paid for soon after the purchase. Appellants' place of business was in Muncie, and appellee's in Ft. Wayne, Indiana. July 28, 1896, appellants addressed a letter to appellee saying: "We have a car load of spokes on hand now. If you want them, send a man over and take them up, and we will pay his car fare to and from Ft. Wayne. Let us hear from you by return mail." July 29, 1896, appellee addressed a letter to appellants, saying: "Your favor of the 28th inst. is received, but as we are chuck full of cheap spoke stock we will not be able to use yours just now. We think however that we can do so after September 1." August 24, 1896, appellee sent a letter to appellants, saying that owing to depression in business, they would discontinue all purchases of wheel material "and will not accept any on or after Sept. 1, 1896. If you have any stock manufactured upon our order please deliver same before that date." The jury further found that the above letters contain the only negotiations between the parties relating to the purchase of the spokes sued for in this action. It cannot be said that

- these letters contain any order for or agreement to purchase the material for which suit is brought. The most that can be said from them is an offer to sell by appellants and a refusal to buy by appellees at that time. It is clear from appellants' letter of July 28, that appellee had no standing order for all spokes appellants might ship until September 1, 1896. In December, 1895, appellants acknowledged receipt of pay for the car load shipped in November, and in the

letter say that if appellee can take another load in the near future, appellants think they can get it and ask an answer by return mail.

The spokes in controversy were delivered on board the cars at Muncie, August 29, 1896, and arrived at Ft. Wayne August 31. The jury found that appellee had at all times refused to accept the spokes sued for. The finding of the jury that the letters above referred to contain the only negotiations between the parties relating to the material in question, precludes the idea that there was any oral agreement between them. If the spokes were sold by appellants, it must have been done by virtue of a contract, and such contract must have been either in parol or in writing. And it can not be denied that if the contract was in writing, it was the duty of the jury to state in their verdict what the writing was, and it then becomes the duty of the court to determine from the writing what the agreement was between the parties. The jury state all that passed between the parties on the subject, and the trial court properly concluded that these negotiations between the parties did not amount to a contract on appellee's part to purchase the spokes in controversy.

The answers of the jury that appellee agreed to purchase these spokes at a particular price are not in harmony with the finding that the above letters constitute all the negotiations between the parties. But the jury's conclusion that a sale was made must give way to the specific findings of facts constituting the contract, the construction of which is for the court, and not the jury. When the jury has found the facts, the court must say whether such facts constitute a contract, and if they do, the court must further say what are the rights and duties of the parties with respect to it. The finding does not show that the sale of the car load of spokes in November, 1895, and in March or

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April, 1896, had any connection with the sale of the spokes in question. We are not unmindful of the rule that a special verdict must be treated as an entirety, that nothing can be added to it by inference or intendment, and that the failure to find a fact in favor of the party having the burden is equivalent to finding such fact against him. *Louisville, etc., R. W. Co. v. Balch*, 122 Ind. 583; *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186; *Louisville, etc., R. W. Co. v. Castello*, 9 Ind. App. 462; *Noblesville, etc., Impr. Co. v. Loehr*, 124 Ind. 79.

As we have already said, the verdict fails to show that appellee had any standing order for all spokes appellants might ship up to September 1, 1896. The correspondence set out in the verdict cannot be so construed. There was some correspondence as to the kind of material appellee would want, and the prices appellee would be willing to pay, but there is nothing in the way of a general order, and the verdict clearly shows that neither party, throughout their dealings, treated any letters of appellee's as a standing order. The spokes that were delivered and paid for were not delivered under any general order, and such delivery cannot be said to be a part performance of one general contract to take all spokes furnished by appellants up to a certain date.

We are not unmindful of the rule that it is the duty of the jury to find the facts and not simply the evidence. But where a contract is in question, it is the duty of the jury to find the facts, and for the court to say whether a contract was or was not entered into. In the case of *Cottrell v. Nixon*, 109 Ind. 378, cited by appellants' counsel, it is said: "It was a fact to be found by the court whether or not the defendant had delivered to the plaintiffs a written promise to pay for the property sold to E. Pleas & Co., if any was sold to

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them. If it had been found that such a contract had been made and delivered to the plaintiffs, and that in consideration thereof the goods had been delivered, the contract might have been made a part of the finding by reference, or by setting it out in the finding." In *Germania Fire Ins. Co. v. Columbia, etc., Tile Co.*, 11 Ind. App. 385, cited by appellants' counsel, one of the issues tendered was that notice of a fire loss had been given the company, in writing, within a reasonable time after the loss or that the company had waived the notice. Instead of finding the ultimate fact that notice had been given, the jury found that certain letters had been written, but it appears that it was not found when any of the letters, except one, were written, nor that they were transmitted or received, nor that notice of the loss was served upon the insurance company through them, or either of them. In the opinion it is said: "The letters may have constituted sufficient evidence of such notice, but they were not a finding that notice had in fact been given, nor does the finding contain such fact." But in the case at bar the jury say that the letters set out in their verdict constitute all the negotiations between the parties concerning the sale of the spokes in question. The question then arises whether these negotiations amount to a contract, and if they do not, it must follow that no sale was made.

It appears that one Wood was the agent of appellee to inspect spokes to be purchased. One of the appellants was asked what arrangements Wood made with him about selling spokes to appellee, and what he did in the way of purchasing or proposing to purchase lumber and spokes for appellee, and what he said or did in regard to purchasing the first car load shipped to appellee. An objection to these questions was sustained. It was not shown that this witness

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was the agent of appellee to do anything other than inspect the material. And even if it was error to exclude the evidence, the error was afterwards cured, for the witness testified in answer to questions by appellants' counsel, that at the time in question, "Mr. Wood came to the office. We went to the mill. He looked over the spokes. They were cross-piled and he would pull a spoke out here and there and look at it. We went in the office. He wanted to know what we wanted for them. He wanted to know what we wanted. We asked his price, he said, 'what do you want?' We told what we would take f. o. b. cars Muncie, Indiana. He said it was pretty high." Q. "What was the price?" A. "\$6.00 per thousand spokes f. o. b. cars Muncie, Indiana." He left in that way, saying he would talk to them,—the head of the affair,—with the manager, and 'whatever he says, I will write right back;' and in a day or so I received a letter."

As is said by appellants' counsel in their supplemental reply brief, the issue in this case is, whether appellants had sold and delivered to appellee, at its special instance and request, the material in question. Taking the special verdict as a whole, the trial court did right in answering the question against appellants. There is no error in the record for which the judgment should be reversed. Judgment affirmed.

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COMPANY.

[No. 2,489. Filed June 16, 1898.]

NEW TRIAL.—Evidence.—When the evidence is not in the record reasons assigned for a new trial which depend upon the evidence cannot be considered on appeal. *p. 429.*

INSTRUCTIONS.—When Not in Record.—The Appellate Court cannot consider an alleged error of the trial court in failing properly to instruct the jury where the instructions given are not in the record. *p. 429.*

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SPECIAL VERDICT.—*Objections.*—Where appellant made no objection to a special verdict, took no exception thereto, and moved for a judgment thereon, he will not be heard to object to it as such on appeal. pp. 429, 430.

STREET RAILROADS.—*Negligence.*—Plaintiff sued defendant for damages on account of injuries to his buggy and team of horses caused by a collision with a street car. The special verdict showed that plaintiff drove upon the track about thirty or forty feet ahead of an approaching car for the purpose of passing another vehicle; that the motorman on the car had no warning that plaintiff was going to turn upon the track, and did all in his power to stop the car before it struck the buggy. *Held*, that defendant was not guilty of negligence. 430, 431.

From the Marion Superior Court. *Affirmed.*

Samuel A. Forkner and A. H. Dickey, for appellant.

Will H. Latta and Ferdinand Winter, for appellee.

COMSTOCK, J.—Appellant sued, before a justice of the peace, for damages on account of injuries to his buggy and team of horses, occasioned by the negligence of appellee's employes. The complaint alleges that appellee is a corporation, acting and doing business under the laws of the State of Indiana; that on the 24th day of May, 1895, appellant was driving a team of horses with buggy attached thereto, lawfully, without any fault or negligence on his part, along and upon a certain public highway and upon the track of appellant; that the defendant did then and there carelessly and unlawfully run its certain street car over, against and upon said appellant's buggy and horses and injured the same in the sum of \$100. The trial before the justice of the peace resulted in a judgment in favor of appellee. An appeal was taken to the Marion Superior Court. The cause was submitted to a jury, and upon request a special verdict was returned, upon which the court rendered judgment in favor of appellee.

The errors assigned on this appeal are: (1) That

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the court erred in overruling plaintiff's motion for a new trial; (2) in overruling plaintiff's motion for judgment on the special verdict; (3) in sustaining defendant's motion for judgment on the special verdict, in rendering judgment in favor of defendant, and against plaintiff for costs. We will consider the assignment of errors in the order in which they are specified.

The grounds for a new trial are: (1) The special verdict is contrary to law, and not sustained by sufficient evidence; (2) it is not sustained by the evidence, and is contrary to the law and the evidence; (3) the damages assessed are too small, the evidence showing damage to the amount of \$50; (4) error of law occurring on the trial in this,—that the court failed to charge the jury as to the law of the case as provided by statute; (5) error of law occurring in this,—that the court failed to inform the plaintiff or his attorneys that a special verdict had been demanded until after the evidence had been closed; (6) the verdict of the jury, as set out in said questions and answers, is contradictory, indefinite, and so uncertain that no judgment can be rendered thereon."

The evidence is not in the record. The first, second and third grounds for a new trial therefore, cannot be considered. The fourth reason cannot be considered for the reason that the instructions of the court are not in the record. The statutes in force at the time of the trial of this cause, required that the request for a special verdict should be made before the introduction of any evidence, and should be prepared by counsel on either side of such cause and submitted to the court, etc. It does not appear that appellant was not given ample time to prepare a verdict for submission to the court, nor that he did not prepare a verdict, nor that he was in any way prejudiced by the failure of the

court to inform him or his counsel that a special verdict had been demanded. Nor is the fact complained of presented by affidavit or otherwise. It is not therefore properly presented. Appellant made no objection to the special verdict, took no exception thereto, and moved for judgment thereon, and cannot now be heard to object to it as such. The sixth reason is not a ground for a new trial, but for a *venire de novo*.

The second and third specifications of the assignment of error may be properly considered together. To warrant a judgment on the special verdict, the findings should show that the defendant company was guilty of negligence which proximately caused the injury to appellant's horses and buggy, and that he was himself free from fault contributing to said injury. To these propositions the following interrogatories and answers, constituting in part the special verdict, are pertinent: "(1) Q. Did the buggy of the plaintiff and a street car belonging to the defendant collide on the Michigan road on or about May 15, 1893? A. Yes (or 24th of May.) (2) Q. Was the plaintiff, immediately before said collision, driving said buggy along the Michigan road at a safe distance from the tracks of defendant? A. Yes. (3) Q. Did the plaintiff, immediately before said collision, turn into said tracks of the defendant for the purpose of passing another vehicle? A. Yes. (4) Q. At the time the plaintiff so turned upon the tracks of defendant, was the car of defendant about thirty or forty feet behind plaintiff? A. Yes. (5) Q. Had the motorman of said defendant any warning that the plaintiff was about to turn upon the tracks, before plaintiff did so turn? A. No. (6) After the plaintiff so turned upon the tracks of defendant, did the motorman of the defendant attempt to stop his car before it should collide with plaintiff's buggy? A. Yes. (7) Q. In making

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such attempt to stop the car aforesaid, did the defendant's motorman exercise all means in his power to stop the same before it should collide with the said buggy? A. Yes."

Waiving the question as to the care exercised by the appellant, although it appears from the verdict that he drove upon the track from a place of safety, the facts in interrogatories and answers numbered 5, 6 and 7, above set out, fully acquit the defendant of all negligence. The verdict does not show negligence upon the part of appellee, nor facts from which it might be inferred. Judgment affirmed.

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[No. 2,554. Filed June 16, 1898.]

EVIDENCE.—*Bill of Exceptions.*—Where the longhand manuscript contains both oral and documentary evidence, and each item of documentary evidence shown to have been introduced is copied into the bill of exceptions immediately following the statement of its introduction, and the trial judge certifies that the bill contains all the evidence given in the cause, it is a sufficient showing that the bill of exceptions contains all the evidence, although the longhand manuscript by the statement and certificate of the official shorthand reporter purports to contain only a transcript of the shorthand report of the evidence. *pp. 435, 436.*

COURT REPORTER.—*Appointment.*—*Presumption.*—Where the record shows that the shorthand reporter was sworn to report the case, and it does not appear whether she was appointed on the court's own motion, or was employed by the parties, or either of them, and no objection to the reporter seems to have been made, it will be presumed on appeal that the action of the court was regular. *p. 436.*

ASSIGNMENT FOR BENEFIT OF CREDITORS.—*Assignments by Nonresidents.*—Under the Kentucky statute, section 75, providing that a deed of assignment shall vest in the assignee the title to all the estate real and personal belonging to the assignor, the title of the assignee in the property assigned is not affected by the failure of the assignor to file a schedule of the property within five days as provided by statute. *pp. 436-438.*

SAME.—*Failure to File Inventory.*—*Assignments by Nonresidents.*—

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The failure of an assignee to file an inventory within fifteen days after his appointment of all the estate that came into his hands as provided by the Kentucky statute, section 81, will not divest his title or right of possession as trustee to the property of the trust. *pp. 438, 439.*

ASSIGNMENT FOR BENEFIT OF CREDITORS.—*Assignments by Nonresidents.—Possession of Property.—Attachment.*—Where there is no provision in the law of the place where the assignment is made requiring anything but the deed of assignment to vest the title of the property assigned in the assignee, and this being by the law expressly declared sufficient, the possession of the property by the assignee, under the deed, was sufficient to protect him against a subsequent attachment. *pp. 438, 439.*

SAME.—*Assignments by Nonresidents.—Possession.—Attachment.*—Where an assignee in Kentucky, who was empowered by the deed of assignment to employ attorneys to assist in the settlement of the trust, sent his attorney to Indiana to take possession of a branch store belonging to the assignor, and the attorney arrived there the next day after the execution of the deed of assignment, and took possession of the stock of goods and caused the deed of assignment to be recorded in the county in which the property was situated, and then left the stock in the possession of the former manager of the store, and posted a notice on the door stating that an assignment had been made, there was possession of the goods by assignee sufficient as against an attachment creditor who had notice of the assignment, although the attorney was employed prior to the execution of the deed of assignment, but did not take possession of the goods until after the execution thereof. *pp. 439-442.*

SAME.—*Assignments by Nonresidents.—Conflict of Laws.*—An attachment creditor can not question the legality of an assignment made in Kentucky of property in Indiana, on the principle of conflict of laws, for the reason that the Indiana laws allow preference of creditors to be made in good faith, while the Kentucky laws do not, as the provision of the Kentucky law is in favor of the general creditor. *pp. 442-444.*

SAME.—*Assignments by Nonresidents.—Conflict of Laws.—Amount of Exemption.*—A voluntary assignment made in another state, and valid under its laws, cannot be attacked in this State, by an attachment creditor of property situated in this State included in the trust, on the ground that the amount of exemption provided by the laws of the sister state is greater than that provided by the laws of this State. *pp. 444-447.*

SAME.—*Assignments by Nonresidents.*—An assignment made in accordance with the law of the state where it is made affecting

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property in this State will be upheld where it is not contrary to the law or policy of this State. *pp.* 447.

From the Jackson Circuit Court. *Reversed.*

Oscar H. Montgomery, for appellant.

Jason B. Brown, for appellees.

BLACK, J.—The appellant, as assignee of George C. Freeman, sued the appellees, Ewing Stilwell, sheriff of Jackson county, and G. W. Marquardt & Sons, a corporation of Chicago, Illinois, for the recovery of possession of a certain stock of goods and damages for the detention thereof. There was an answer in denial, and a trial by the court resulted in a finding for the appellees, in accordance with which judgment was rendered.

The overruling of the appellant's motion for a new trial is assigned as error, and it is contended that the finding was not supported by sufficient evidence. The complaint showed, in substance, that said Freeman, being a resident of Montgomery county, Kentucky, and insolvent, owning the stock of goods in question situated at Seymour, Jackson county, Indiana, on the 16th day of September, 1896, made a general assignment of all his property, for the benefit of all his *bona fide* creditors, to the appellant, and in that behalf duly executed an indenture of assignment in writing, a copy of which was exhibited with the complaint, in all things in accordance with the laws of Kentucky, a copy of said laws also being exhibited with the complaint; that on the same day the appellant accepted the trust and executed his bond with sureties, which was thereupon approved by the county judge of said county, duly qualified and entered upon the discharge of his duties as such assignee, and caused said indenture to be recorded in the office of the clerk of said

Montgomery county, where the assignor then resided, and where the business in respect of which the same was made was carried on, and also in each other county wherein real estate conveyed is situated, and on the 17th of September, 1896, caused a copy of the same to be recorded in the office of the recorder of Jackson county, Indiana; that on the 21st day of September, 1896, on account of the sickness of said assignor, the county court of said Montgomery county, on proper application, duly entered an order of record in said court extending for thirty days the time for said assignor to file a schedule under oath setting forth the general nature and full value of the estate assigned, together with a list of his creditors, and on the 7th of October, 1896, said assignor filed said schedule duly verified by his oath; that on the 17th of September, 1896, the assignee took possession of said personal property in Jackson county, Indiana, so assigned to him, located at a place described in the city of Seymour, in charge of one E. G. Kay, of the value of \$1,200; that the appellant as such assignee made an inventory of said property, and filed the same in the clerk's office of the county court within fifteen days thereafter and reported the same to the county court of said Montgomery county, and obtained an order from said court for the sale of said property either at public or private sale, in his discretion; that said estate was still pending in said court and unsettled.

It was alleged that the appellant was the owner in his trust capacity of said property, and entitled to the possession thereof; but on the 22d day of September, 1896, the appellees having actual notice and knowledge of said assignment, wrongfully seized and took said property from the appellant, under and by virtue of a writ of attachment sued out by said corporation

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in the court below, in an action against said assignor, and the appellees still wrongfully and unlawfully detained said property from the appellant in said Jackson county, to his damage in the sum of \$500; that the appellee Stilwell was sheriff of said Jackson county and as such had the custody of said property for said corporation. Prayer for judgment for the possession of said property and for \$500 for the detention thereof.

The learned counsel for appellees argued before us quite forcibly against the consideration by us of the evidence set forth in a bill of exceptions, insisting that it does not sufficiently show that it contains all the evidence given in the cause. It appears in the bill of exceptions that the evidence was reported by a shorthand reporter spoken of therein as the official shorthand reporter of the court. It is contended that while the bill shows on its face that much documentary evidence was given in the cause, it purports to contain the evidence taken down in shorthand by the official reporter, and does not state that it contains the documentary evidence. In the formal expressions employed by the reporter her report is spoken of as an original longhand manuscript of the evidence taken and reported by her in shorthand, and in her certificate she refers to her report to which the certificate is appended as a longhand transcript of her shorthand report of the evidence, and states that it contains all the evidence given in the cause. Each item of documentary evidence shown to have been introduced is copied into the bill immediately following the statement of its introduction, and is thus made a part of the reporter's longhand transcript and of the bill of exceptions. The judge certifies that this longhand manuscript contains all the evidence given in the cause. While the longhand manuscript of the evidence thus formally purports to be a transcript of the

shorthand report of the evidence, it appears that a part of the evidence was oral and a part documentary, but it is manifest what part was oral and what part was documentary.

The settling of a bill of exceptions is a judicial act. The judge in his judicial capacity having declared that the bill contains all the evidence given in the cause, the objection that the items of documentary evidence were copied into the stenographer's long-hand report of the evidence and the entire report denominated by the reporter and the judge as a long-hand manuscript of the reporter's shorthand report, is so merely technical a criticism that to allow it would be contrary to sufficiently manifest truth.

Some question is made in argument as to the validity of the statute relating to official shorthand reporters, but it is an immaterial matter in this case, for there sufficiently appears to have been a compliance with the act of 1873 relating to shorthand reporters. In the record it is stated: "This cause is now called for trial, and Miss Bessie Burrell is sworn to report the case."

No objection to the reporter appears to have been made. It does not appear whether she was appointed on the court's own motion or was employed by the parties or either of them, or that the oath was administered upon a motion of a party. In the absence of any showing upon the subject, we will not presume that the action of the court was not regular.

It appears from the evidence that the assignee through his authorized agent took possession of the goods at Seymour on the 17th of September, 1896, and while he still, through his servant, held possession, the property was seized on the 22d day of the same month, under the writ of attachment issued on that day.

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The statute of Kentucky introduced in evidence provided, amongst other things, for the acknowledgement of the deed by the assignor, and for the recording thereof in the county clerk's office, and that "the deed shall vest in the assignee the title to all the estate, real and personal, with all the deeds, books and papers relating thereto belonging to the assignor at the time of making the assignment," etc. Ky. St., section 75. The statute also provided: "The assignor within five days from the day upon which the deed of assignment is lodged for record, shall file in the county where the assignee qualifies, to be recorded therein, a schedule under oath setting forth the general nature and full value of the estate assigned, together with a list of his creditors," etc.

The evidence showed that the deed was executed and acknowledged by the assignor, and accepted by the assignee, and filed in the clerk's office, on the 16th of September, 1896. On the next day the assignee, before the county court, qualified, offering his bond, which was then approved by the court, and taking the oaths required by law. On the 21st of September, 1896, the assignor was by said court given until the 30th of the same month to file his schedule, and the assignee was ordered by said court to proceed at once to sell the stock of merchandise assigned to him by said assignor, located at Seymour, Indiana. The assignor filed his schedule on the 7th of October, 1896.

It is contended on behalf of the appellees that the assignment was ineffectual to vest title in the assignee until the assignor filed his schedule. With this view we are unable to agree. The statute provided that the deed of assignment should vest the title in the assignee, and it would seem reasonable to conclude that when the deed had been executed by the assignor and accepted by the assignee and had been duly recorded.

and the assignee had duly qualified as such and he had taken possession of the personal property assigned, his title as trustee could not be affected by mere delay of the assignor in filing his schedule, whether the delay were previously authorized by order of the court or not. The filing of the schedule was a part of the needful proceedings in the settlement of the trust estate after the title thereto had passed from the assignor to the assignee to be administered under the supervision of the court.

The statute elsewhere provides means for enforcing disclosure by the assignor of information concerning the estate and claims against it, and it cannot reasonably be thought that any mere default on his part after the making of the assignment shall operate to deprive the creditors whose interests are represented by the assignee of the benefit contemplated by the statute.

By one of the provisions of the statute it was made the duty of the assignee to file in the clerk's office of the county court, "as soon as maybe, and within fifteen days after his qualification, unless the court allows longer time, an inventory verified by him of all the estate that came to his hands." Ky. St., section 81.

On the 8th of February, 1897, the appellant filed in said court a supplemental report and inventory taken by him by his duly authorized attorney E. K. S. Clinkerbeard, in Seymour, Indiana, on September 17, 1896, which inventory does not appear to have been verified. It seems to have been thought by counsel for the appellees that because of the delay in filing this inventory beyond the period mentioned in the statute, and the fact that it was not verified, the assignment had not taken place when the writ of attachment issued. Ample provision appears in the statute also for enforcing the performance of the as-

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signee's duties therein prescribed. It was provided that he could be required, upon reasonable notice, to file such reports as might be ordered. His delay in filing any report or inventory, or any defect in the report or inventory, even one for which the report or inventory might have been rejected, or one which he might have been required to correct, could not divest his title or right of possession as trustee to the property of the trust. The statute of Kentucky did not provide that failure of the assignor or the assignee to perform such prescribed duties after the making of the assignment should render it invalid. There being nothing in the law of the place of the contract requiring anything but the deed in order to vest title, and this being by that law expressly declared sufficient, we are of the opinion that at least nothing but the assignee's possession under the deed was needed after the execution of the deed, to protect him against subsequent attachment. See *Appeal of Howland* (N. H.), 35 Atl. 943.

It is also urged on behalf of the appellees, that under the facts of the case as shown by the evidence, the appellant cannot be regarded as having taken possession of the property in question before the writ of attachment was levied upon it.

Among the provisions of the deed of assignment was one that the trustee had full power to employ attorneys to assist in the settlement of the trust, and that the assignee "hereby employs E. K. S. Clinkerbeard." The assignor resided in Montgomery county, Kentucky, where his principal business was located, the store at Seymour being a branch establishment in charge of a Mr. Kay. The assignee did not himself come to Indiana until after the goods had been taken by the appellees. He employed said Clinkerbeard, who was a lawyer, and sent him to Seymour on the

17th of September, 1896, to take charge of the goods. He was directed by the assignee to come in his interest. He took possession of the goods through Clinkerbeard, who arrived at Seymour on the day last mentioned. He went to file notice of assignment and to take charge of the goods then in the charge of Kay. He delivered the deed of assignment to the deputy sheriff of Jackson county at Seymour, and requested him to notify Mr. Kay of the assignment, which the deputy did; and then, at the request of Clinkerbeard, the deputy went to Brownstown, the county seat, and filed the deed of assignment. Immediately after the notice to Kay, Clinkerbeard assumed charge of the business, receiving the keys of the store, and took an inventory of the stock, except certain goods belonging to said Chicago corporation which were there on consignment. He afterward delivered this inventory to the appellant. After the inventory was completed Clinkerbeard employed said Kay to guard the property in the absence of the former, until he or the assignee could return and assume charge. The business was suspended and the doors were closed, and a notice of the cause was put on the door with the address of the assignee. Clinkerbeard performed this service at the instance and request of the assignee.

One William B. Tompkins, a resident of Chicago and an employe of said corporation, its confidential man with power of attorney, also went to Seymour on the 17th of September, 1896. He met Clinkerbeard there and told him the business he was on, which the evidence indicates to have been to obtain a mortgage from said Freeman. Tompkins, at the store, when Clinkerbeard was there, read the deed of assignment and Clinkerbeard's power of attorney. Tompkins displayed his power of attorney to Clinkerbeard, who allowed the former as the representative of the corpora-

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tion to remove all goods in the store on consignment, and Tompkins received from Clinkerbeard certain goods sent on consignment from the corporation. This was on the 17th or 18th, "probably the 19th" of September, 1896, as Tompkins testified. After removing these goods, Tompkins helped Clinkerbeard in completing the inventory, that he might depart on a train that afternoon, which was the 18th of September, 1896, as Clinkerbeard testified.

At the time he helped to make the inventory, he was informed that Mr. Freeman had made an assignment to Mr. Pitman, and he saw the deed of assignment and a power of attorney from the assignee to Clinkerbeard. After the departure of Clinkerbeard, Tompkins remained in Seymour, and the attachment proceeding was commenced at his instance, the writ being issued and served on the 22nd of September, 1896. He accompanied the sheriff and assisted in taking the goods. When they went to take the goods, the store was closed, and there was a notice posted on the door stating that the store was closed and that Freeman had assigned to Pitman. The sheriff obtained the keys from Mr. Kay, and took the goods in charge and had since kept them in the county.

It is thus plainly shown by the evidence that the assignee took possession through his agent and was holding the goods by his servant when the writ of attachment was issued. That the assignee might take and hold the goods through a servant cannot be questioned. It is claimed that the attorney who took possession for the assignee had been employed before the assignee had qualified as such, and therefore had no sufficient authority. The possession was taken after the execution and acknowledgement of the deed and on the day on which the assignee qualified. Whenever the appointment was made the employment con-

tinued after the assignee had qualified. At the time of the issuing of the writ some days afterward, the assignee manifestly was relying upon the acts of his servants in his behalf. He was then holding the goods through Kay. The assignee could not have denied responsibility as such for the acts of these servants. The attaching creditor had full knowledge of the assignment and of the fact that the goods were not held by Kay for the assignor, but were in his charge for the assignee, from whom Tompkins accepted surrender of goods not covered by the assignment. We think the possession of the assignee was sufficiently shown.

Finally, it is contended that the assignment having been made in Kentucky under the laws of that state, is fraudulent and void in respect to the property situated in Indiana. In *Woolson v. Pipher*, 100 Ind. 306, to which reference is made by appellees, and by which we are bound, it was held that a voluntary assignment for the benefit of creditors made in Ohio could not defeat the lien of attaching creditors upon goods in this State, where the writ of attachment was in the hands of the sheriff before possession of the goods had been obtained by the assignee. In *Union Savings, etc., Co. v. Indianapolis Lounge Co.*, ante., 325, this court had occasion to point out that there is no statute of our State prescribing the duties of a foreign assignee to whom has been assigned personal property situated in this State, and it was held by us that a voluntary assignment for the benefit of creditors made in another state and perfected in accordance with the law thereof, so as to pass the title to the assignor's property in that State, will also pass title to his personal property situated in this State, though as to tangible personal property so situated, the assignee's actual possession thereof must be acquired in order to vest title in him as

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against an attaching creditor. We also held in that case that in the final taking possession by the assignee no stricter rule applies than in the case of ordinary purchase.

It is contended that to uphold this Kentucky assignment would be contrary to the policy and statutory law of Indiana. In this connection it is said by counsel that our law allows preference of creditors made in good faith,—that a debtor in failing and embarrassed circumstances may, in contemplation of making an assignment, prefer some of his creditors to the exclusion of others,—while by the statute of Kentucky in evidence it is provided that if the assignor, before making the deed, shall have made any preferential or fraudulent transfer, conveyance or gift of any of his property, or a fraudulent purchase of any property in the name of another, “the property so fraudulently transferred, conveyed or purchased shall vest in the assignee,” and it shall be his duty to institute proceedings to recover it, etc. Ky. St., section 84. Without discussing the question as to the difference between the law of this State and that of Kentucky here stated, it may be said that if no preferences are permissible in Kentucky, such as are allowable in Indiana, the difference would seem to be in the interest and for the benefit of the creditors in general, and not one of which the appellees could be heard to complain.

In the deed of assignment the assignor reserved to himself and family a homestead and all exemptions under the laws of Kentucky. The statute of that state in evidence excepts from the property which shall pass by the deed of assignment the property exempt by law unless embraced in the deed, and provides that if the assignor reserves any property under the exemption laws, the court shall, by methods prescribed by the statute, cause it to be set apart to the

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debtor; and that if a homestead is claimed, the court may, by consent of the assignee, and if it appears to be for the interest of the creditors, or if the land is not divisible without impairing its value, direct the property to be sold and the value of the homestead, not exceeding \$1,000, to be paid to the assignor.

It is contended that the exemption laws of Kentucky are opposed to the policy of this State, which exempts to the debtor property not exceeding in value \$600.00. It does not appear in this case otherwise than as above stated what are the exemption laws of Kentucky. Nor does it appear that in fact the appellant's assignor actually received or would receive any homestead or an exemption of property of any definite value, or what exemption he will in fact receive.

Our statute concerning voluntary assignments for the benefit of creditors relates only to assignments made in this State, and has no reference to assignments made in other states. It was said in *Catlin v. Wilcox, etc., Co.*, 123 Ind. 477, that it is well settled that personal property is transferable according to the law of the owner's domicil, and that a voluntary assignment or transfer, made without compulsion or legal coercion, is to be governed everywhere by that law, unless the contract by which the transfer was made is limited or restrained by some policy or positive enactment of the state in which the property is situate, or unless it affects citizens of the latter state injuriously. In *Weider v. Maddox*, 66 Tex. 372, 1 S. W. 168, it was said: "It seems, however, to be everywhere admitted that a general voluntary assignment, for the benefit of creditors, made by an insolvent debtor, in accordance with the laws of the place of his domicil, will pass all his personal property wherever situated, unless the operation of such assignments is

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limited or restrained by some law of the state in which the property is situated." In *Atherton v. Ives*, 20 Fed. 894, it was said, that the right of a state to regulate the transfer of property within its jurisdiction, must be exercised by the state, and the intention clearly expressed in a statute, or by the settled policy of the state; otherwise, a transfer of personal property, good and valid in the domicil of the owner, will be held good and valid in another state. See, also, *Baltimore, etc., R. R. Co. v. Glenn*, 28 Md. 287. In *Bentley v. Whittemore*, 19 N. J. Eq. 462, it was held that a voluntary assignment made by a debtor, the assignor and assignee being residents of New York, and the assignment being valid by the laws of New York, could not be impeached in New Jersey with regard to property there situated, in behalf of creditors, residents of New York or New Hampshire or Rhode Island, on the ground that the assignment was incompatible with the statutes of New Jersey, the incompatibility in question relating to the creation of preferences. The court said: "The true rule of law and public policy is this: that a voluntary assignment made abroad, inconsistent, in substantial respects, with our statute, should not be put in execution here to the detriment of our citizens, but that, for all other purposes, if valid by the *lex loci*, it should be carried fully into effect. It is highly desirable that the judicial determinations in the several states should be in harmony on this important subject, and it would certainly seem, from present indications, that the rule above propounded will be the one most likely to receive general approbation." In *Barnett v. Kinney*, 147 U. S. 476, it was held that an assignment of all his property for the benefit of creditors, with preferences, by a citizen of Utah to another citizen of Utah, valid by the laws of Utah and at common law was valid in Idaho

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against an attaching creditor, a resident of Minnesota, as to personal property in Idaho of which the assignee had taken possession, notwithstanding the provision of the statute of Idaho that no assignment by an insolvent debtor otherwise than as therein provided should be binding on creditors, and the creditors must share *pro rata*, without priority or preferences. See, also, *Williams v. Kemper, etc., Co.*, 4 Okl. 145, 43 Pac. 1148; *Livermore v. Jenckes*, 21 How. (U. S.) 126; *Schroder v. Tompkins*, 58 Fed. 672. In *Weider v. Maddox, supra*, it was held that a voluntary assignment made in Missouri was not invalidated as to property situated in Texas by the fact that the assignment made the kind of property and its value which was reserved from the operation of the deed to depend upon the laws of Missouri regulating exemptions. It was said: "Exemption laws have application to persons resident in the state in which they exist, and when an assignment conveys property in that and another state, it would seem that the exemption should be measured by the law of the domicil."

We have not been referred to any case in which it has been decided that a voluntary assignment made in one state and valid under its laws may be attacked in another state on the ground that the amount of exemption provided by the laws of the former is greater than that provided by the laws of the latter.

Such an exemption under a foreign assignment is not in contravention of any statutory provision in this State; nor can we be considered as deciding contrary to the policy of our State, which under its laws provides for exemption of property from execution against its resident householders, if we should recognize and uphold the title of an assignee in possession of goods in this State under a valid voluntary assignment made in Kentucky, as against a subsequently

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issued writ of attachment sued out by an Illinois creditor of the assignor, because the sister state by its laws also allows such exemption, though in other and greater amount than would here be allowed one of our resident householders under our laws, and the foreign debtor has in his own state claimed his lawful exemption.

Basing our decision upon the facts of the case before us, we do not mean to be understood as concluding that the result should be different if the attaching creditor were a citizen of this State. We are of the opinion that the assignment should be upheld because it is in accordance with the law of the state where made, and not contrary to the law or policy of this State. The finding was not supported by sufficient evidence. Judgment reversed.

SCHLEMMER, ADMINISTRATOR, v. SCHENDORF.

[No. 2,424. Filed March 31, 1898. Rehearing denied June 16, 1898.]

APPEAL AND ERROR.—*Bill of Exceptions.*—A bill of exceptions filed during the term of court in which the motion for a new trial was overruled and exceptions were taken is properly a part of the record, although it is not shown that time was given to present the bill. *pp. 448, 449.*

DECEDENTS' ESTATES.—*Witnesses.*—*Competency.*—*Practice.*—*Bills and Notes.*—*Loss of Note.*—Section 506, Burns' R. S. 1894, makes adverse parties incompetent as witnesses in an action against a decedent's estate as to matters occurring during the lifetime of decedent, but under section 510, Burns' R. S. 1894 the court may in its discretion require any party to a suit to testify. No error was committed in permitting the wife of decedent, in an action by her against her deceased husband's estate, on a promissory note, to testify over objection as to the loss of the note in suit, such permission being an exception because of necessity, to prevent a failure of justice. *pp. 449-452.*

BILLS AND NOTES.—*Voluntary Destruction of Note by Holder.*—Where a wife, under the influence of strong feeling, induced by cruel and unmanly treatment by her husband, destroyed a note held by her against him, such destruction will not amount to a discharge and satisfaction of the debt where no fraudulent design is shown. *pp. 452-455.*

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From the Montgomery Circuit Court. *Affirmed.*

E. C. Snyder, for appellant.

G. W. Paul and *H. D. Van Cleave*, for appellee.

BLACK, J.—The appellee, Emma Schendorf, filed her claim against the estate of her deceased husband, Nicholas Schendorf, of which the appellant is the administrator, with the will annexed. The statement of claim consisted of two paragraphs, and the cause was tried without an answer, the finding for the appellee showing by the amount thereof that the court found for her upon both paragraphs of the statement. The appellant's motion for a new trial was overruled.

There is no dispute as to the right of the appellee to recover upon the first paragraph of her statement of claim, but the question is presented as to whether the amount of the recovery was too large to the extent of the sum allowed under the second paragraph, and it is urged that there was error in the introduction of certain evidence in support of that paragraph. It is suggested on behalf of the appellee that the bill of exceptions, without the presence of which in the record these matters could not be considered, cannot properly be regarded as part of the record.

The motion for a new trial was filed and was overruled at the term at which the trial was had and the finding was made. On the day on which the motion was overruled, and at the same appearance of the parties, being on the 5th day of March, 1897, the appellant filed the bill of exceptions containing the evidence. The final portion of the bill, preceding the signature of the judge, is as follows: "And the said defendant now here tenders this his bill of exceptions, and prays that the same may be signed, sealed and

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made a part of the record, which is done this 5th day of March, 1897." Objection is made to this bill on the ground that the record does not show that, at the time the trial court ruled upon the motion for a new trial, the appellant asked for time in which to file a bill of exceptions, or that the court allowed any time in which the appellant might present the bill, and on the ground that the date of presentation is not shown in the bill.

It was held by this court in *Noblesville, etc., Co. v. Teter*, 1 Ind. App. 322, that, "under the provisions of the code of 1881, a bill of exceptions may preserve and bring into the record exceptions taken at the term at which it is signed and filed, and evidence given, and exceptions to rulings made, on the trial of a cause in which a motion for a new trial has been overruled at the term at which the bill is signed and filed, though the entry does not show that any time was allowed for the presentation of the bill, and the date of presentation be not stated in the bill. This court in such case will presume that time within the term for the presentation of the bill to the judge was given by parol at the proper time, and that the bill was presented to the judge within the time so allowed, and will regard the purpose of the statutory requirement that the date of presentation shall be stated in the bill as having been accomplished." We cannot sustain the appellee's objections to the bill before us.

The claim was filed on the 15th of October, 1896. The second paragraph of the statement of claim was based upon a promissory note not governed by the law merchant for \$180.00 with interest at 8 per cent. per annum and attorney's fees, dated January 23, 1892, payable two years after date, made by the decedent to the appellee. It was alleged in the statement of

claim that the original note was lost, or mislaid so that it could not be found. One of the claimant's witnesses testified that he drew up three notes, one for \$500.00, another for \$180.00 and one for \$80.00, the notes being the same in form, except as to the amounts and dates of payment; that they were all executed by the decedent to the claimant, who took possession of them at the time they were executed; that the consideration of the notes was the settlement of a certain suit of the claimant against the decedent then pending in the court below. This witness stated the contents of the note for \$180.00, the copy given by the witness corresponding with that set out in the second paragraph of the statement of claim. Afterward, in the course of the trial, the appellee having testified as a witness that she was the plaintiff and was the widow of Nicholas Schendorf, her counsel "read the alleged copy of the alleged lost note set out in the second paragraph of the complaint," and asked her what became of that note. The bill of exceptions shows, that "to this question the defendant objected, for the reason that the plaintiff was not a competent witness to testify as to anything that occurred during the lifetime of her husband, and that unless it was intended to show by the witness that the note was lost after the death of her husband, she ought not to be permitted to testify." The court overruled this objection, and "stated that he would hear the evidence of the witness as to the loss of the note." The claimant then testified as follows: "I took that note one day, when it came due, and asked my husband to pay me. He refused, and we had some words about it. He cursed and abused me, and made me cry. I did not want to quarrel with my husband, and I then put the note in the stove and burned it up. As I shall answer to God, that is the way it was." It will be observed that sec-

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ondary evidence of the contents of the note in suit was introduced without objection. The claimant was not asked to testify as to the contents of the note, but was asked to state what became of that note, the contents of which had been proved.

The statute, section 506, Burns' R. S. 1894 (498, Horner's R. S. 1897), provides, that "In suits or proceedings in which an executor or administrator is a party, involving matters which occurred during the lifetime of the decedent, where a judgment or allowance may be made or rendered for or against the estate represented by such executor or administrator, any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a competent witness as to such matters against such estate." In section 510, Burns' R. S. 1894 (502, Horner's R. S. 1897), it is provided that in any case referred to in section 506 (498), *supra*, "any party to such suit shall have the right to call and examine any party adverse to him as a witness, or the court may, in its discretion, require any party to a suit or other person to testify, and any abuse of such discretion shall be reviewable on appeal." In *Milam v. Milam*, 60 Ind. 58, which was a claim against a decedent's estate upon a note alleged to be lost, the action of the trial court in permitting the claimant to testify, over objection, to the loss of the note, and that it was lost by her out of her own possession, was sustained upon appeal. The statute then provided that in such case, "neither party shall be allowed to testify as a witness unless required by the opposite party or by the court trying the cause."

The court referred to the general rule of the common law that parties were incompetent as witnesses, and to the fact that there were exceptions to that rule on account of necessity, to prevent a failure of justice, and quoted from Greenleaf on Evidence a passage, a

part thereof being as follows: "If a deed or other material instrument of evidence is lost, it must first be proved, * * * that such a document existed; after which the party's own oath may be received to the fact and circumstances of its loss, provided it was lost out of his own custody." The court was of the opinion that it was not the intention of our statute to narrow the common law rules as to the admissibility of witnesses to testify, and that in adopting the general rule of that law as to the admissibility of the particular class of parties named in the above quotation from the statute then in force, it adopted it with its exceptions, and it was held that the case before the court fell within such exceptions, and that the trial court had not erred in permitting the witness to testify. Under the authority of this case we must hold that, upon the objection of the appellant to the competency of the claimant to testify as to anything that occurred during the lifetime of the decedent, the court below did not err in deciding to hear the testimony of the witness as to the loss of the note.

It is contended further, on behalf of the appellant, that there could be no recovery upon the note because of the manner in which it was shown to have been destroyed by the act of the party now suing upon it. It is quite plain upon the whole evidence that there ought to be a recovery upon the second paragraph of claim, if there was legitimate proof of the note. Whatever may have been the rule at one time, not every suit upon a destroyed note is now defeated upon the mere reason that its destruction was the voluntary act of the party seeking to recover upon it.

In *Riggs v. Tayloe*, 9 Wheat. 483, it was said: "It is further contended, that it appears from the plaintiff's own showing, the destruction or loss of the writing was voluntary, and by his default; in which case, he

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ought not to be permitted to prove its contents. It will be admitted, that where a writing has been voluntarily destroyed, with an intent to produce a wrong or injury to the opposite party, or for fraudulent purposes, or to create an excuse for its nonproduction, in such cases, the secondary proof ought not to be received; but in cases where the destruction or loss (although voluntary) happens through mistake or accident, the party cannot be charged with default." In *Bagley v. McMickle*, 9 Cal. 430, it was said: "The object of the rule of law which requires the production of the best evidence of which the facts sought to be established are susceptible, is the prevention of fraud; for, if a party is in possession of this evidence, and withholds it, and seeks to substitute an inferior evidence in its place, the presumption naturally arises, that the latter evidence is withheld for fraudulent purposes which its production would expose and defeat. When it appears that this better evidence has been voluntarily and deliberately destroyed, the same presumption arises, and unless met and overcome by a full explanation of the circumstances, it becomes conclusive of a fraudulent design, and all secondary or inferior evidence is rejected. If, however, the destruction was made upon an erroneous impression of its effect, under circumstances free from suspicion of intended fraud, the secondary evidence is admissible. The cause or motive of the destruction is then the controlling fact which must determine the admissibility of this evidence in such cases." In *Tobin v. Shaw*, 45 Me. 331, it was said, that when the document has been destroyed by the party moving to prove its contents, the burden is upon him to show, affirmatively, circumstances which negative the fraudulent design. See, also, *Joannes v. Bennett*, 5 Allen (Mass.) 169; *Blade v. Noland*, 12 Wend. 173, 27 Am. Dec. 126. In *Speer v.*

Speer, 7 Ind. 178, 63 Am. Dec. 418, it was held, that the voluntary surrender and destruction of an unrecorded deed may have the effect of divesting the title of the grantee by estopping him from proving the contents of the destroyed instrument and thus disabling him to establish title in himself. In *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638, it was held that where the grantor of real estate got possession of the deed of conveyance by delivery from the grantee, or with his consent, the latter could not recover the land because of his voluntary destruction of the evidence of title; that he could not be permitted to allege that the deed was lost and thereupon give evidence of its contents, when he had surrendered it to be canceled. In *Rudolph v. Lane*, 57 Ind. 115, the rule was stated to be, that where a party purposely, and apparently with a fraudulent design, destroys a writing, he will not be permitted to give parol evidence of its contents, without first introducing evidence to rebut the suspicion of fraud arising from his act. In *Old National Bank v. Findley*, 131 Ind. 225, it was said of *Thompson v. Thompson*, *supra*, that the person who, in that case, destroyed the instrument might have reaped some advantage from the destruction, and that the same was substantially true of *Speer v. Speer*, *supra*. As was said in *Fisher v. Mershon*, 3 Bibb. 527, in nearly every case where writings are lost, negligence in a greater or less degree, is imputable to the owner.

The testimony of the appellee showed that in destroying the original evidence, she acted under the influence of strong feeling, caused by the cruel and unmanly treatment to which she had been subjected by the maker of the note, her husband. It does not appear that the note was paid in whole or in part. She took it one day when it came due and asked her husband to pay her. Her request was met with unbear-

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able abuse, which caused her to weep, and in the condition of mind thus induced, the wife destroyed the note. Her act of destruction of evidence was injudicious, but under the circumstances disclosed, it was attributable to other motive than fraudulent purpose. While the case is not wholly free from difficulty, yet, accepting as true the appellee's testimony, from which alone we know of the destruction of the note and of the manner in which it was destroyed, and of the reasons which influenced her conduct, it may be said that it was destroyed under circumstances which did not amount to a legal discharge and satisfaction, and which seem to repel all inference of fraudulent design. The judgment is affirmed.

PAXTON, RECEIVER, v. TYLER.

[No. 2,678. Filed April 19, 1898. Rehearing denied June 16, 1898.]

APPEAL AND ERROR.—*Parties.*—*Decedents' Estates.*—Pending the approval of a final report of the administrator of a decedent's estate, showing the estate to be insolvent, the wife of decedent filed a petition asking that a sum of money theretofore paid by her on certain claims against the estate be paid her by the administrator. The court, at the request of the administrator and petitioner, and also appellant, a creditor of the estate, made a special finding of the facts, stated conclusions of law thereon and rendered judgment in favor of petitioner, from which the creditor appealed. *Held*, that the administrator was a necessary party to the appeal,

From the Knox Circuit Court. *Appeal dismissed.*

W. H. DeWolf, for appellant.

William F. Townsend and *John Wilhelm*, for appellee.

COMSTOCK, J.—John W. Emerson, administrator of the estate of Wilson M. Tyler, deceased, filed in the office of the clerk of the Knox Circuit Court his final report as such administrator.

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The estate was insolvent. Pending the approval of said report,—the appellee, one of the distributees of said estate, filed her petition asking that a sum of money theretofore paid by her on certain claims against said estate be paid to her by the administrator. The appellant appeared to the petition and upon leave of court demurred to the petition on the ground that it did not state sufficient facts. The demurrer was overruled and appellant excepted and answered the petition by general denial. At the request of the administrator, appellant, and the appellee, the court made a special finding of facts, and stated conclusions of law thereon. Appellant excepted to the conclusions of law, and appealed to this court.

The court stated as conclusions of law; (1) That the final report of the administrator should be approved. (2) That appellee was entitled to have and recover the distributive shares of appellant, of the Fourth National Bank of Cincinnati, O., of the State National Bank of Terre Haute, and of Franklin Clark, paid to her. (3) That the total amount for distribution in the hands of the administrator was \$20,486.22, which should be distributed as follows: To Margaret E. Tyler, \$20,398.42; Joseph Peibles, \$54.37; J. Shilletto & Co., \$30.43; C. H. Debolt, \$3.00. The court rendered judgment approving said final report, and directed distribution in accordance with the finding. The only parties to this appeal are Paxton, appellant, and Margaret E. Tyler, appellee. No attempt has been made to make any other person a party.

Appellee moves to dismiss the appeal upon a number of grounds. We deem it necessary to refer only to the first and second. The first ground of the motion is that the administrator of the estate is not a party to the appeal; second, because the State National Bank of Terre Haute, the Fourth National

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Bank of Cincinnati, Shilletto & Co., Joseph Peibles and C. H. Debolt are not parties to the appeal. Appellee claims that they are all necessary parties to the appeal. The judgment is against the administrator, for the distribution of the balance in his hands to the parties hereinbefore named. The judgment is unappealed from. It does not appear from the record before us that he has any notice of this appeal.

Judge Elliott, in his Appellate Procedure in section 138, says: "It is essential that all persons whose interests may be substantially affected by the judgment on appeal should be made parties to the appeal in some appropriate mode. * * * Only one appeal can be prosecuted from a joint judgment by those who are parties to it, and yet all must be before the court to which the case is carried. But, while all the parties to a joint judgment must be brought in on an appeal, they need not be brought in as consenting parties but they may be notified, and if notified, they are before the court, whether they expressly join or refuse to join in the appeal." In section 140 of the same work it is said: "While it is safe to affirm that all persons included in a joint judgment must be parties to the appeal, it is not safe to say that only such persons must be parties to the appeal, for there may be cases where the decree or judgment is not strictly a joint one in which all the parties are so affected by it as to be necessary parties to the case on appeal. * * * So where a fund is in court for distribution the claimants of the fund may, in some instances, be affected by a judgment awarding part of it to some of their number, and if so, all affected should be parties, for their rights cannot be justly adjudicated without their presence as parties." *Hunderlock v. Dundee Mortgage and Trust Co.*, 88 Ind. 139, was a suit upon a note, and to foreclose a mortgage upon real estate given to secure the same. The mort-

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gage was executed by one Snyder to one Mitchell, who transferred the notes and mortgage to John Hunderlock, plaintiff in the action. The Dundee Mortgage and Trust Company held a junior mortgage on the same land. From the judgment of the lower court, plaintiff appealed, without making Snyder and his wife parties to the appeal. In passing upon the motion to dismiss the appeal, the Supreme Court said: "Appellee has moved to dismiss this appeal because of the appellant's failure to make Snyder and wife parties to the proceedings upon it in this court. No case has been cited in support of this motion, which is, in all respects, in point as a precedent, and, so far as we are advised, the precise question presented by the motion is one of first impression in this court. But it is an elementary rule in appellate proceedings that all the parties to, and affected by, the judgment appealed from must be, actually or constructively, included in the appeal, upon the principle that those only before the appellate court are bound by the appeal, and that hence the inclusion of all the parties to the judgment appealed from is necessary to confer complete jurisdiction upon the latter court. Any other rule might result in the prosecution of two or more appeals from the same judgment, thus requiring the appellate court to review the same proceedings a second or greater number of times without having at any given time jurisdiction of all the parties to the judgment, and, consequently, with only limited jurisdiction over the subject matter of the appeal."

In *Beatty v. Voris*, 138 Ind. 265, an administrator petitioned for an order to sell land to satisfy an allowed claim secured by a lien on the land, and other creditors being made parties thereto upon their own motion, filed a cross-complaint to which the claimant was made a party. Issues were joined on the cross-

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complaint. The trial resulted in a judgment therein against the claimant, setting aside and disallowing the claim. The court held that an appeal from such findings was governed by the decedent's estate act and that the administrator of the decedent was a necessary party to the appeal. See, also, *Koons v. Mellett*, 121 Ind. 585; *Hutts v. Martin*, 131 Ind. 1; *Brown v. Trexler*, 132 Ind. 106; *Garside v. Wolf*, 135 Ind. 42; *Gregory v. Smith*, 139 Ind. 53; *Bozeman v. Cale*, 139 Ind. 190; *Cooper v. Peterson*, 7 Ind. App. 411.

It is clear, under the authorities cited, that the administrator is a necessary party to the appeal. It is not therefore necessary to pass upon the other grounds of the motion. Appeal dismissed.

CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. DAVIS.

[No. 2,454. Filed June 17, 1898.]

SPECIAL VERDICT.—*Trespass.*—*Damages.*—*Railroads.*—In an action in trespass by a land owner against a railroad company for injuries to his land by reason of the destruction of a hedge fence thereon and the removal of defendant's tracks on his land, a special verdict finding that plaintiff was damaged in the sum of \$100.00 by reason thereof, and the value of the land decreased, will support a judgment in his favor without finding the market value of the land before and after the injury.

From the Clinton Circuit Court. *Affirmed.*

Guenther & Clark, John T. Dye and Elliott & Elliott,
for appellant.

Palmer & Palmer, for appellee.

HENLEY, C. J.—Appellant's road, running through Clinton county, passes through the farm of Elon Davis, the appellee. The only right of way through said farm owned by appellant is such a one as it has acquired by prescription. The appellee owned a hedge

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fence along the south side of the railroad which was within ten feet from the track of the railroad. Appellant moved its track some three or four feet to the south, and the hedge fence interfering with the running of trains, appellant cut it down and cut off the branches which protruded toward appellant's track. It was for this alleged injury to the appellee that he brought his action.

The complaint is as follows: "(1) The plaintiff complains of the defendant, and says that at the times hereinafter mentioned the defendant was, and still is, a duly incorporated railroad company, owning and operating a railroad through Clinton county, Indiana; that said railroad passes over and upon the lands of plaintiff in said county; that on and prior to the 8th day of June, 1896, the plaintiff owned a hedge fence along the southwest side of said railroad, and about ten feet from the track of said railroad; that his said hedge fence was one hundred rods in length and was of the value of \$300; that on the 8th and 9th days of June, 1896, the defendant, by its servants and employes, unlawfully and wrongfully entered upon plaintiff's said premises, and chopped down and destroyed plaintiff's said hedge fence, and wrongfully moved said defendant's railroad track five feet nearer to said fence, by reason of which chopping and removal of said track, said hedge fence was wholly destroyed, to plaintiff's damage in the sum of \$300, and his said lands adjoining said railroad track were damaged in the sum of \$50.00 by reason of removing said track five feet nearer thereto. Wherefore plaintiff demands judgment for \$350.00 and all proper relief." Appellant answered in two paragraphs. Reply filed to the second paragraph of answer. There was a jury trial, and a special verdict returned, upon which the court rendered judgment in favor of appellee for \$100.

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The errors assigned by appellant are: (1) The court erred in overruling the demurrer to the first paragraph of complaint. (2) The court erred in sustaining appellee's motion for judgment in his favor upon the special verdict returned by the jury in this cause. (3) The court erred in overruling appellant's motion for judgment in its favor upon the special verdict returned by the jury in this cause. (4) The court erred in overruling appellant's motion for a *venire de novo*. (5) The court erred in overruling the motion for a new trial. Appellant's argument is directed to the second, third and fifth specifications.

The special verdict of the jury found the following facts amongst others: That the appellant's railroad runs over and upon appellee's lands; that the appellant has no right of way for its road over appellee's lands except such as it has acquired by user; that it has acquired only three feet in width from the end of its ties; that appellee was, on the 8th and 9th days of June, 1896, the owner of a hedge fence extending across his said lands on the southwest side of appellant's railroad; that appellee's hedge fence was about nine feet from the west end of appellant's ties; that on the 8th and 9th days of June, 1896, appellant removed its railroad track from where it then was toward appellee's hedge fence; that appellant so moved its track three feet, and that appellant so moved its track onto appellee's land; that appellant, by its agents and employes, on said 8th and 9th days of June, 1896, entered upon appellee's said lands and chopped and injured said hedge fence; that appellant, on said days, removed its railroad track towards appellee's hedge fence, and chopped and injured said fence without appellee's consent; that appellee had owned and been in possession of said hedge fence twenty-two years; that appellee was damaged by reason of said appel-

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lant's interference with, and chopping of his said hedge fence, on the 8th and 9th days of June, 1896, in the sum of \$100; that appellee's land was lessened in value by such cutting and trimming of the hedge fence.

The above findings support every material allegation of the appellee's complaint, and there was evidence from which the jury was justified in so finding. It was not necessary for the jury to find the market value of the land before the alleged destruction of the hedge, and its market value after the hedge was destroyed. If we concede that the damages should be arrived at in that way, that this should be the manner of proof, still such questions have no place in a special verdict, which is intended to contain the facts deduced by the jury from the evidence before it. From such evidence the jury could and did determine appellee's damage.

It was not error to refuse to submit to the jury interrogatory numbered 44a. Upon the facts as found by the jury in their special verdict, the lower court could not have done otherwise than render judgment for the appellee. Judgment affirmed.

FLEMING v. REED, ADMINISTRATOR.

[No. 2,196. Filed April 7, 1898. Rehearing denied June 17, 1898.]

MORTGAGES.—Conveyance of Mortgaged Real Estate.—Assumption of Mortgage.—Where a grantee of real estate by the terms of the deed assumed and agreed to pay, as a part of the purchase-money, a mortgage thereon, he thereby became the principal debtor for the debt so assumed, and the mortgagor, who was the grantor, became surety. *p. 467.*

SAME.—Conveyance of Mortgaged Real Estate.—Assumption of Mortgage.—Liability.—Where a purchaser of a part of a tract of real estate assumed and agreed to pay a certain mortgage on the entire tract, the part conveyed became the primary security, and the

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grantee was thereby bound to protect the owner of the remaining portion thereof from loss by reason of the mortgage. p. 467.

MORTGAGES.—*Conveyance of Mortgaged Real Estate.*—*Assumption of Mortgage.*—*Liability.*—The fact that the owner of a portion of a tract of real estate did not appear and seek affirmative relief in a suit to foreclose a mortgage existing on the entire tract would not release the owner of the remaining portion thereof, who had assumed the payment of the mortgage, from liability to such owner for the violation of such agreement. pp. 469, 470.

SAME.—*Deeds.*—*Assumption of Mortgage.*—*Estoppel.*—Where a grantee of real estate went into possession of the real estate under a deed of conveyance containing a stipulation that the grantee assumed, as part of the purchase-money, the payment of a mortgage existing thereon, and received the rents and profits thereof until the foreclosure of the mortgage, and until the year of redemption had expired, he will be estopped from disclaiming his acceptance of the deed. pp. 470, 471.

From the Randolph Circuit Court. *Affirmed.*

F. H. Snyder, John M. Smith and David T. Taylor,
for appellant.

R. H. Hartford, W. H. Williamson and John J. Cheney, for appellee.

BLACK, J.—The complaint of the appellee as administrator of the estate of Jennie B. Hagins, deceased, against the appellant, contained two paragraphs, and a demurrer to each of them for want of sufficient facts was overruled.

In the first paragraph it was shown that on the 26th day of September, 1887, one Charles Smith sold, and by deed of general warranty conveyed, to Samuel K. Hagins, husband of the intestate, lot four in Votaw's addition to the city of Portland, Jay county, Indiana; that on November 28, 1887, said grantee executed to said grantor a promissory note for \$2,000 for the balance of the purchase-money for said real estate, and on the same day, to secure the payment of the note, the grantee executed to the grantor a mortgage on said real estate, and the intestate joined with her hus-

band in the execution of the mortgage. On the same day, said Samuel K. Hagins, by warranty deed, in which the intestate joined, conveyed, for a valuable consideration, to one William B. Hagins the north one-third part of said lot; and on the 5th of March, 1888, said William B. Hagins, being an unmarried man, conveyed by warranty deed, for a valuable consideration, said north one-third part of said lot to the intestate. Afterward, said Samuel K. Hagins and the intestate and Charles Smith having discovered a mistake in the description of the real estate in said mortgage, in order to correct said description, said mortgagors, on the 28th of November, 1888, executed to the mortgagee a new mortgage, correcting the description in the first mortgage by adding the words "in Votaw's addition." At the same time a new note was given by Samuel K. Hagins to Smith for \$2,186.66, being the same \$2,000 of purchase-money and its interest, secured by the first mortgage; and this new note, due in two years, was secured by the new mortgage, which covered all of said lot four. A copy of this new mortgage was filed with the complaint, and was referred to in the first paragraph as part thereof. It purported on its face to be made for the correction of the specified mistake in the description in the former mortgage, and referred to the note secured as being given for a part of the purchase-money of the mortgaged real estate. On the 20th of August, 1889, said Samuel K. Hagins, being unable to pay off the whole of said mortgage on said lot four, "for the purpose of protecting and saving his said grantee and this plaintiff's said decedent the north one-third of said lot," sold, and by deed in which the intestate joined conveyed to the appellant the south two-thirds of said lot four, being forty-four feet off of the south side thereof, and, as a part of the purchase price thereof, the appel-

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lant assumed and agreed to pay the sum of \$2,000 of said note and mortgage which said Smith then held against the whole of said lot; and the appellant also assumed and agreed to pay the interest on said note for the years ending November 28, 1889 and 1890. It was alleged that said agreement was in writing, and was incorporated in and made a part of said deed of conveyance, a copy of which was filed with the complaint as an exhibit. The deed exhibited contained the assumption and agreement to pay as so alleged. It was also alleged that the debt and note which the appellant so assumed and agreed to pay was the same debt and note secured by said mortgage; that the appellant thereupon took possession of said south two-thirds of said lot, and collected the rents and profits thereof, until the 20th day of August, 1892; that he failed and neglected to pay said sum of \$2,000 with the interest thereon for the years ending November 28, 1889 and 1890, when the same became due, or at any time, and failed and refused to pay any part thereof as he had so contracted and agreed to do; but he allowed said note to be sued on, and said mortgage to be foreclosed on the whole of said lot, and allowed, permitted and suffered the whole of said lot to be sold by the sheriff of said county in 1890, to pay and satisfy said note and mortgage, and to pay and satisfy the judgment and decree of the court in said suit on said note and mortgage; that on the 20th of August, 1892, and after the year for the redemption of the real estate from the sheriff's sale, the title in and to all of said lot was by the sheriff conveyed to said Smith, to pay and satisfy that part of said note and mortgage which the appellant had assumed and agreed to pay; that the balance of said note and mortgage which was over and in excess of the \$2,000 which appellant agreed to

pay was fully paid and discharged by said Samuel K. Hagins before the title to said lot was so conveyed by the sheriff to said Smith; that thereby, and on account of the neglect and default of the appellant to pay said sum of \$2,000 with the interest thereon for the years ending November 28, 1889 and 1890, on said note and mortgage debt, and on account of his failure to comply with his said agreement, the intestate lost and was deprived of the title to said north one-third of said lot; that by reason of said sale of the north one-third of said lot, the intestate was compelled to and did, by virtue of said sale and conveyance of the sheriff, pay upon said note and mortgage and upon the debt so assumed by the appellant and which he so assumed and agreed to pay, the sum of \$1,000; that said south two-thirds part, when so conveyed to the appellant, was of the value of \$1,500; that at the same time, and at the time the intestate's one-third part was sold, it was of the value of \$1,000. Counsel for both parties in their briefs say that the second paragraph of complaint was substantially the same as the first. We therefore have no occasion for setting forth the allegations of the second paragraph.

When the intestate joined her husband in the first mortgage to Smith, the entire lot mortgaged was owned by the husband, and he was indebted to the mortgagee for the purchase-money, to secure which the mortgage was given. The second mortgage, executed by the same mortgagors to the same mortgagee, to secure the same purchase-money, was executed after the intestate had become the owner of the north one-third of said lot; but it was executed to correct a mistake in the description of the mortgaged premises in the first mortgage, and therefore, though the intestate was a married woman, and the debt so secured in part by mortgage upon her separate property was

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her husband's debt, the entire lot, including her portion of it, was effectually bound by the second mortgage to Smith, to secure the purchase-money still owed to him. The second mortgage took the place of the first. Thereafter the husband of the intestate sold and conveyed his remaining portion of the lot (the intestate, as his wife, joining in the conveyance) to the appellant, who accepted the conveyance and entered into possession thereunder. He thereby, as the terms of the deed of conveyance provided, assumed and agreed to pay, as part of the purchase price, the already existing encumbrance upon the entire lot. The appellant thus became bound as the principal debtor for the debt so assumed, and the intestate's husband became surety for this indebtedness. *Ellis v. Johnson*, 96 Ind. 377, and cases cited; *Stanton v. Kenrick*, 135 Ind. 382.

The whole lot remained bound to the mortgagee. The portion conveyed to the appellant became a primary security, while the portion owned by the intestate was a secondary security. It was the duty of appellant to protect from loss through the mortgage the intestate, whose real estate, thus standing as surety for him, he had so contracted to protect. For the violation of this duty she was entitled to recover to the extent of the damage suffered by her through loss of her said real estate. The mortgagee was entitled to avail himself of the agreement of assumption made by the appellant with the mortgagor, and one occupying the relation of surety by reason of ownership of a part of the mortgaged real estate would have the right of subrogation to all rights and securities held by the creditor, including such an agreement of assumption, of which, in the case before us, the mortgagee does not appear to have availed himself. *Wright v. Briggs*, 99 Ind. 563. In the case at bar the appellant appears

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also to have been bound by contract between him and the intestate to save her harmless. In this State, a wife's interest in the real estate of her husband is not an encumbrance, but is an estate in the land. *Bever v. North*, 107 Ind. 544. The release by a wife of her inchoate interest may be a valuable consideration for a promise to her. *Jarboe v. Severin*, 85 Ind. 496; *Worley v. Sipe*, 111 Ind. 238; *Sedgwick v. Tucker*, 90 Ind. 271. When a wife joins with her husband in the conveyance of his land, it will be presumed, in the absence of any special agreement to the contrary, that the inducement for the release of her inchoate right as to the grantee was the consideration paid by him for the land. *Jarboe v. Severin*, *supra*.

It is alleged in the complaint that this conveyance by husband and wife of the real estate of the former was made for the purpose of protecting and saving to the intestate her part of the lot, and there was in the deed a special agreement, the performance of which by the appellant would have had that effect. The deed contained a stipulation for the benefit of the wife individually. The agreement that the appellant should assume and pay the encumbrance on the entire lot, including the wife's separate part thereof, was made as part of the consideration, in a deed in which she joined for the purpose of releasing her inchoate interest in the land so conveyed. We think that if it were needed to resort to such a reason for permitting her to avail herself of the agreement of assumption to reimburse her for its breach, it might be treated as a contract made with her upon a sufficient consideration. But if the assumption of the mortgage debt and agreement to pay it should be regarded, so far as it was a promise to relieve her portion of the lot, as the promise of one person to another for the benefit of a third, it was founded upon a valuable consideration, which

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the appellant received and enjoyed, and the intestate was entitled to recover upon the promise to the extent of her loss through the appellant's failure to perform it. Whatever she might have had the right to do, she was not, as between her and the appellant, bound to pay off the mortgage debt of \$2,000 and seek for reimbursement through the mortgage from the appellant's part of the lot worth \$1,500, or to seek to procure the exhaustion of his part of the lot before resort by the creditor to her portion of it. See *Wilcox v. Campbell*, 106 N. Y. 325, 12 N. E. 823. The paragraph of complaint to which our attention has been thus called was sufficient on demurrer.

The court sustained demurrers to the second, third, fourth and sixth paragraphs of the appellant's answer. These rulings have been very briefly discussed by counsel for the appellant, and their references to the record relating to them are incorrect. These paragraphs relate to the suit to foreclose the mortgage, and to transactions between parties thereto other than the appellant and the intestate, and contain much irrelevant matter. It appears from them that there was no issue between the intestate and the appellant in the foreclosure suit. It does not appear that any personal judgment was rendered, but there was a decree of foreclosure, under which all the mortgaged real estate was sold. The fact that the intestate did not seek any affirmative relief in the foreclosure suit could not release the appellant from his obligation to her. It was his duty, by reason of his contract of assumption, to make it unnecessary for her to take such measures to relieve her portion of the lot from the mortgage. It devolved upon him to make his own defense in the foreclosure suit, to which he was a party, and having failed therein and thereafter to prevent the loss to the intestate from which he had contracted to

save her, he was liable to be required to respond in damages.

In the fifth paragraph of answer, a demurrer to which was overruled, the appellant alleged, that in the negotiations for the purchase by him of the portion of the lot conveyed to him, he did not agree to assume and pay the mortgage debt, and that the intestate and her husband inserted such agreement in the deed without his knowledge or consent, and placed the deed on record, the appellant not having read it, without telling him that they had inserted such provision, and without his knowledge that it did contain such provision.

The appellant's demurrer to the second paragraph of reply to the fifth paragraph of answer was overruled. In this reply it was alleged, that after the execution of the deed of conveyance to the appellant, and after it had been recorded, the appellant went into possession of the real estate and into the buildings thereon situated, as the owner of said real estate; that he continued in such possession and had the use of the property and received the rents and profits thereof until the foreclosure of the mortgage and the sale thereunder, and until the year for redemption had expired; that during all the time he so held the real estate he did so and claimed title to and owned the real estate by virtue of said deed of conveyance, and had no other title thereto; that when he went into possession, and while he so held, he had notice and knowledge of the contents of said deed, and that it was of record in the recorder's office; that the use, rents and profits of the real estate while he so held possession were of the value of one thousand dollars. In argument for appellant it is said that this reply only avers that Fleming went into possession and collected rents with knowledge that the deed had been recorded. The

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averments of the reply, which we have in substance set out, are much broader than thus represented, and seem to show sufficiently that the appellant was estopped to disclaim his acceptance of the deed of conveyance.

There is in the transcript a special finding of facts with the court's conclusions of law thereon, and it is assigned that the court erred in its conclusions of law. This assignment, as has been decided often, is unavailing, for the reason that the special finding is not signed by the judge. The judgment is affirmed.

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[No. 2,219. Filed Jan. 6, 1898. Rehearing denied June 17, 1898.]

SPECIAL VERDICT.—Sufficiency.—The special verdict must find in favor of the party having the burden of proof all the facts essential to a recovery. p. 473.

RAILROADS.—Fires Escaping from Right of Way.—Damages.—Special Verdict.—A special verdict in an action against a railroad company for damages on account of fire escaping from its right of way to plaintiff's premises must show the negligence of defendant, and that the injury sustained by plaintiff was without his fault or negligence, and it must also show what plaintiff did to prevent the injury. p. 474.

SAME.—Fires Escaping from Right of Way.—Damages.—Special Verdict.—Interrogatories.—Passive Negligence.—An interrogatory and answer in a special verdict in an action against a railroad company for damages on account of fire escaping from defendant's right of way to plaintiff's premises, "Did plaintiff do anything which in any way aided the spread of said fire from said right of way, or which in any way contributed toward the spread of said fire to his said lands? Ans. 'No.'", shows that plaintiff did nothing contributing to his injury, but does not show that he did not omit to do something which he should have done to prevent the injury. pp. 474-478.

APPEAL AND ERROR.—Rehearing.—Petition.—A petition for a rehearing, and brief in support thereof may be presented together, but the particular points upon which the rehearing is asked must be stated in the petition. pp. 479-482.

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From the Lake Circuit Court. *Reversed.*

E. C. Field, J. B. Peterson and W. S. Kinnan, for appellant.

Thad. S. Fancher, for appellee.

WILEY, J.—Appellee was plaintiff below, and prosecuted this action against appellant for damages alleged to have been sustained by fire resulting from the alleged negligence of appellant. The complaint is in two paragraphs, but as no question is presented for our consideration as to the sufficiency of the complaint, it is unnecessary to set it out at length in this opinion. It is sufficient to say that the appellee was the owner of certain real estate situated in Lake county, Indiana, and near the appellant's track and right of way.

The negligence complained of in the first paragraph of the complaint is that appellant permitted dry grass, weeds, and other combustible matter to accumulate on its right of way, and that the same was negligently and carelessly set on fire by sparks and coals of fire from a passing locomotive, which fire, it is charged, the appellant suffered to escape from its right of way on to adjoining lands, and thence on to appellee's land, to his damage, etc.

The negligence complained of in the second paragraph of the complaint is, that in August, 1893, during a great drought, the appellant directed its servants and employes, to cut upon its right of way and near appellee's land, the weeds, grass, etc., growing thereon, and while the same were very dry, appellant directed its servants to set fire to such grass, weeds, etc., for the purpose of burning them up, and that it, through its servants, negligently permitted such fire to escape from its right of way on to adjoining lands.

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and thence on to appellee's land, where his property was destroyed, to his injury, etc.

The sufficiency of the complaint was challenged by a demurrer, which was overruled, as is shown by the record, but the demurrer is not in the record, the clerk certifying that it is not upon the files in his office; but as appellant in its brief, raises no question as to the sufficiency of the complaint, it is thereby waived and we need not notice it further.

The case was put at issue by a general denial, trial by jury, a special verdict, and judgment thereon in favor of the appellee. The appellant moved for a *venire de novo*, for judgment in its favor on the special verdict, and for a new trial, each of which motions the court overruled, and appellant excepted.

The third specification of the assignment of error calls in question the overruling of appellant's motion for a *venire de novo*. The fourth, fifth and sixth specifications in the assignment of error are as follows: "(4) The court erred in overruling appellant's motion for judgment in its favor; (5) the court erred in rendering judgment in favor of the appellee; (6) the court erred in overruling appellant's motion for a new trial."

The special verdict consists of eighty-seven interrogatories and answers thereto. It is earnestly insisted by appellant that the special verdict is so defective, uncertain, and ambiguous, that no judgment could be rendered upon it, and hence it was error to overrule its motion for a *venire de novo*.

It is the settled law in this State that a special verdict must find and state all the facts essential to the party's recovery, having the burden of proof. *Indiana, etc., R. W. Co. v. Barnhart*, 115 Ind. 399; *Louisville, etc., R. W. Co. v. Berkey*, 136 Ind. 181; *Louisville, etc., R. W. Co. v. Miller*, 141 Ind. 533; *Pittsburgh, etc.,*

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R. W. Co. v. Adams, 105 Ind. 151; *Conner v. Citizens' Street R. W. Co.*, 105 Ind. 62; *Wabash R. R. Co. v. Miller*, 18 Ind. App. 549. Thus, in a case of this character, the verdict must show the negligence charged against the appellant; that the injury sustained by the appellee was without his fault or negligence, and that it must also show, what if anything, appellee did to prevent the injury.

Appellant contends that the verdict does not find that the appellant was negligent as charged, and also fails to find that appellee was without fault on his part. While we do not decide the question, for it is unnecessary, we are inclined to the view that the verdict does find and show that appellant was guilty of actionable negligence. As to the want of negligence on the part of the appellee, we quote in full all the findings relative thereto as follows: "73. Did plaintiff do anything which in any way aided the spread of said fire from said right of way, or which in any way contributed toward the escape of said fire from defendant's right of way, or which in any way aided or contributed toward the spread of said fire to his said lands, or which in any way aided or contributed toward the burning of his said lands? Ans. No." "74. Was the plaintiff guilty of any negligence in the setting, or in the escape of said fire from defendant's right of way? Ans. No." "75. Was the plaintiff guilty of any negligence or carelessness in or about the burning by said fire of his said lands? Ans. No." "76. Is it not a fact that plaintiff was not guilty of any negligence or carelessness which in any way contributed to the escape of said fire or the spread thereof to his said lands or to the burning of his said lands, or to the damage which he suffered from said fire. Ans. No." (Rec. p. 34, 11.5 to 27.)

It is clear, under the authorities, that interroga-

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tories 74 and 75, call for conclusions and not statements of facts, and that the answers thereto are conclusions of law. See *Wabash R. R. Co. v. Miller*, 18 Ind. App. 549, and authorities there cited. Number 76 may have been misunderstood by the jury, but it having been answered in the negative, it is directly against the appellee. This only leaves finding 73 to be considered.

Standing alone, we do not think it sufficiently shows that appellee was free from fault. The interrogatory contains four elements, all of which are negative: (a) Did plaintiff do anything which aided the spread of the fire from the right of way; or (b) which contributed to the escape of the fire; or (c) which aided or contributed toward the spread of the fire to his lands; or (d) which aided or contributed to the burning of his lands? The jury answered this interrogatory in the negative, and hence we cannot say that there is a clear and distinct finding that appellee did not do anything contributing to the injury of which he complains; but there is no finding that he did anything to prevent the injury, after the fire was carried to his premises, or that he omitted to do anything which contributed to his injury. In plainer words, it finds that appellee did not do anything contributing to his injury, but it does not find or show that he did not omit to do something which he ought to have done.

In *Galloway v. Chicago, etc., R. R. Co.*, 58 Am. and Eng. R. R. Cas. 251, it is said: "Negligence consists in doing something, or omitting to do something, which a person of ordinary prudence and care would not have done, or would not have omitted to do, under like or similar circumstances." There are two classes or kinds of negligence,—active and passive. A person is equally liable for doing a negligent act, which would be active negligence, or in omitting to do an act, which

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would be passive negligence, where, by such omission, injury would follow. One person may do a negligent act which may result in injury, but if the injured party stand passively by, and let the act produce its natural effects, such injured party cannot recover, if he failed to do something which a reasonably prudent man, under like circumstances, would have done, or could have done, by the doing of which he could have averted the injury, or natural result of the negligent act.

Thus, one person may negligently set fire upon his own premises, and negligently permit it to escape to the adjoining premises of his neighbor; yet if such other party stand by and see the fire destroy his property, when he could do something, without hazard, to prevent the injury, he cannot recover. He thus becomes passively negligent in failing to do something which it was his duty to do. As was said in *Briant v. Detroit, etc., R. W. Co.*, 61 Am. and Eng. R. R. Cas. 523: "It is true that, if the fire had been started, and the plaintiff could have extinguished it, he would have been in fault in not doing so."

The burden rested upon the appellee to prove that his own negligence, be it either active or passive, did not contribute to his injury. And it is not sufficient that the verdict is silent and there is nothing therein even tending to show either contributory negligence or freedom therefrom. As was said in *Hinckley v. Cape Cod R. R. Co.*, 120 Mass. 275, and quoted approvingly by this court in the *City of Huntingburg v. First*, 15 Ind. App. 552: "Mere proof that the negligence of the defendant was a cause adequate to have produced the injury will not enable plaintiff to recover, as it does not necessarily give rise to the inference of due care upon his part, proof of which is essential in his case." In that case

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gence of the defendant was sufficient to produce the injury complained of, yet it was still incumbent upon the plaintiff that the evidence show him free from fault. In the case under consideration it would be necessary for the appellee to prove and the verdict to find and state such facts. But the question we are now considering has been put at rest in this State, and there is now no longer any room for doubt or legitimate debate. The Supreme and this court have repeatedly held that in cases of this character, the special verdict must show what the plaintiff did, if anything, to prevent the injury, and if it fails to so show, the verdict is defective, and will not support a judgment.

The latest case, and in which the authorities are collected and cited, is that of the *Wabash R. R. Co. v. Miller, supra*. In that case the verdict was silent as to the negligence of the appellee, except that there was a finding that the injuries occurred without any fault or negligence on his part, which finding was held to be a conclusion of law and not a finding of a fact. The verdict was also silent as to what the appellee did or omitted to do, if anything, to prevent or avert the injury, except that there was a finding that appellee and members of his family made all reasonable efforts to subdue and extinguish the fire, and this finding was held to be a conclusion of law, and not the finding of a fact. Black, J., speaking for the court said: "When, in such a case, the property owner had notice of the fire endangering his property to the loss for which he sues, if he could have prevented the loss by reasonable effort, and did not make such effort, or unless any attempt he could make and did not make to save his property after he discovered its danger, would be useless or extraordinarily hazardous or difficult, he can not recover for such loss. If he fail to do his duty, then to the extent to which his loss is attributable to

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such failure, he must bear it without compensation from the company. Where, as in this State, the burden rests upon the plaintiff to show his want of contributory negligence, it becomes necessary for him to show whether or not he or his servant in charge of the property had knowledge of the existence of the fire during its progress, and if it is not made to appear that such knowledge did not exist, then it devolves upon the plaintiff to show what efforts were made to save him from loss, and it is incumbent upon him to prove the use of efforts reasonable under the circumstances." *Bevier v. Delaware and Hudson Canal Co.*, 13 Hun, 254; *Hogle v. New York, etc., R. R. Co.*, 28 Hun, 363; *Eaton v. Oregon, etc., Navigation Co.*, 19 Or. 391, 24 Pac. 415; *Tilley v. St. Louis, etc., R. W. Co.*, 49 Ark. 535, 6 S. W. 8; *Louisville, etc., R. W. Co. v. Lockridge*, 93 Ind. 191; *Wabash, etc., R. W. Co. v. Johnson*, 96 Ind. 40; *Cleveland, etc., R. W. Co. v. Hadley*, 12 Ind. App. 516; *Tien v. Louisville, etc., R. W. Co.*, 15 Ind. App. 304; *Louisville, etc., R. W. Co. v. Porter*, 16 Ind. App. 266; *Chicago, etc., R. R. Co. v. Bailey*, 19 Ind. App. 163. See, also, *Louisville, etc., R. W. Co. v. Roberts*, 18 Ind. App. 538, and authorities there cited. Also *Cameron v. Oberlin*, 19 Ind. App. 142.

The verdict here fails to show whether or not appellee, his agents or servants were present at the fire, and if present, or had knowledge of it, what he or they did if anything, to prevent the injury. In this regard the special verdict was defective, and it was error to overrule appellant's motion for a *renire de novo*. The verdict failing to show all the essential facts entitling the appellee to a judgment, we might very properly direct judgment thereon in favor of appellant, but justice seems to demand a new trial. The judgment is therefore reversed, with directions to the court below

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to sustain appellant's motion for a new trial, and for further proceedings not inconsistent with this opinion.

ON PETITION FOR REHEARING.

WILEY, J.—Appellee has filed what purports to be a petition for a rehearing. The paper so filed is indorsed as follows: "Appellee's motion and brief for a rehearing." The paper filed, in our judgment, is nothing more than an additional argument on the merits of the case. The motion and brief are one and the same thing, and in the beginning it is said: "The appellee in the above entitled cause moves the court for a rehearing in said case, and in support thereof assigns the following reasons: We believe that the court committed an error in reversing the judgment of the lower court." This is the only reason assigned for a rehearing, and appellee's brief on the motion immediately follows. True, a petition for a rehearing, and brief in support thereof may be presented together under our practice, although the particular points upon which the rehearing is asked, must be stated in the petition. Elliott's Appellate Procedure, section 555; *Fertich v. Michener*, 111 Ind. 472.

Among other things, rule thirty-six of this court provides: "Rehearing must be applied for by petition in writing, setting forth the cause for which the judgment is supposed to be erroneous." Section 662, Horner's R. S. 1897, provides that within sixty days after a case has been determined in the Supreme Court, either party may file a petition for a rehearing, etc. Rule thirty-seven of the Supreme Court is identical on the question of a petition for a rehearing as rule thirty-six of this court, and the statute and rule have frequently been construed by that court. It will be observed that both the statute and the rule contemplate the filing of a petition, and

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the rule provides that the petition shall set forth the "cause for which the judgment is supposed to be erroneous." A petition for a rehearing is a pleading, under the rules of appellate procedure, and must be so regarded by the courts. *Baltimore, etc., R. W. Co. v. Conoyer*, 149 Ind. 524. In this case no distinct or separate petition for a rehearing has been filed, but appellee has contented himself by filing a brief, and asks the court to grant him a rehearing because the court committed an error in reversing the judgment of the lower court.

In his Appellate Procedure, Judge Elliott, sec. 555, says: "The office of a petition for a rehearing is to specifically present points for the consideration of the court. A general statement that the court erred in the conclusions asserted in its opinion is insufficient. The petition should state what conclusions counsel suppose to be erroneous, * * * the particular points must be stated in a petition. General statements will be unavailing, and assertions cannot supply the place of argument and authorities." In *Goodwin v. Goodwin*, 48 Ind. 584, the court said: "The office of a petition for a rehearing is not to request the court generally to re-examine the questions in the record, or all the questions decided against the party filing it, but it is to point out particularly the errors the court is supposed to have committed in the decision which it has made." See, also, *Western Union Telegraph Co. v. Hamilton*, 50 Ind. 181; *Fertich v. Michener*, 111 Ind. 472. In *Baltimore, etc., R. W. Co. v. Conoyer, supra*, the court said: "A petition for a rehearing, under the rules of appellate procedure, is a pleading, and not a mere argument or brief, as is the paper in this case which is denominated a petition."

In *Reed v. Kalfsbeck*, 147 Ind. 148, the court said: "Appellees have filed a motion to reject what purports

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to be a petition for a rehearing filed by the appellant in this cause, for the reason that it fails to conform to rule thirty-seven of this court, in not setting forth the cause for which the judgment of reversal is supposed to be erroneous. The petition in question is nothing more than an argument, in support of the original contention of the appellant and does not state any particular cause or errors by reason of which the decision of the court, as heretofore announced, is supposed to be erroneous. It is the office of a petition for a rehearing to state or point out wherein the court erred in the result reached upon the original hearing. The requirement of rule thirty-seven conforms to good practice, and should be strictly enforced. See *Goodwin v. Goodwin*, 48 Ind. 584; *Western Union Telegraph Co. v. Hamilton*, 50 Ind. 181; *Fertich v. Michener*, 111 Ind. 472, 486; *Elliott App. Proc.*, sections 555, 893. Parties and their counsel, in appeals to this court, are bound to keep in mind the rules which control the procedure therein, and are required to yield obedience and conform thereto. *Harness v. State*, 143 Ind. 420." In *Finley v. Cathcart*, 149 Ind. 470, it was said: "A petition for a rehearing, in this court, is a pleading, and should not be an argument, and in order that it may conform to the rule of appellate practice, as it seems to be settled by repeated adjudications of this court, it must state specifically the errors which the petitioner considers the court committed in the result reached in the former hearing, and general statements, or assertions, that the decision is erroneous, will not suffice. An applicant for a rehearing should include in his petition all the grounds upon which he bases his claim for a rehearing, and those not included therein, will be deemed by the court to have been waived, and will not be considered. The

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alleged petition herein, for the reasons which we have stated, does not comply with the rule as required, and consequently presents no question for review."

Under the uniform decisions and rule thirty-six of this court, the paper filed by appellee in this cause, and designated by indorsement on the back "Appellee's motion and brief for a rehearing," does not present any question for review, for the reason that it does not specify the particular causes, or any particular cause, on account of which the opinion heretofore announced is supposed to be erroneous. It is therefore overruled.

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[No. 2,445. Filed April 19, 1898. Rehearing denied June 28, 1898.]

STREETS.—Rights of Public.—Municipal Corporations.—The rights of the public in a city street are greater than in an ordinary country highway. *p. 486.*

SAME.—Rights of Abutting Property Owners.—Removal of Soil from Street.—Municipal Corporations.—A city can remove the natural soil from a street and use it upon another street only when the improvement of the two streets is embraced in one and the same general plan of improvement. *p. 486.*

SAME.—Rights of Abutting Property Owners.—Removal of Soil from Street.—Municipal Corporations.—An abutting property owner who owns the fee of the street has the right to the surplus soil in excavations for the improvement of such street; but he must take possession thereof, or show a legal excuse for not doing so, and upon his failure to remove same within a reasonable time the city may treat it as abandoned, and use it in the improvement of other streets. *pp. 486-489.*

PRACTICE.—Intermediate Errors.—Overruling a demurrer to a bad paragraph of answer is not reversible error, where it is shown from the findings that plaintiff did not fail to recover because of any defense set up in the answer, but because of failure to prove his complaint. *pp. 489, 490.*

APPEAL AND ERROR.—Rehearing.—Transfer to Supreme Court.—After a case has been argued and decided solely upon its merits, a constitutional question cannot be raised upon a petition for a rehearing for the purpose of having the case transferred to the Supreme Court. *pp. 490, 491.*

SAME.—Rehearing.—Questions not urged in argument before the

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decision of the cause will not be considered after a rehearing has been granted on other grounds. *p. 491.*

From the Vanderburgh Superior Court. *Affirmed.*

J. E. Williamson and W. W. Ireland, for appellant.

D. C. Givens, for appellee.

ROBINSON, C. J.—Appellant sued appellee for the value of certain gravel, earth and stone alleged to have been taken by appellee from certain streets in said city and converted to appellee's use. Appellee answered admitting the taking, and pleading facts in justification. A demurrer to this answer was overruled, and a demurrer to the reply sustained. These rulings are assigned as error, and are first discussed by counsel, but as the same questions are presented by the special finding they will be considered in that connection.

So far as necessary to determine the questions raised, the special finding shows that appellee contracted for the improvement of a portion of First street according to certain plans and specifications, the cost of the improvement to be assessed against abutting real estate, except street and alley intersections; by the specifications, the stone, earth and gravel on the street were to be removed by the contractor to places to be designated by the city officers, except that all the earth claimed by the property owners should be deposited where directed by them. The price paid the contractor for the improvement included the cost of hauling all the material and substance excavated from the street. Before the commencement of the work appellant notified the contractors and board of public works of appellee to haul the materials taken from First street and deposit the same upon certain lots designated, which demand was refused, the city claiming the right to use the gravel upon other streets

and stating its intention to so use the same; that in improving First street it was necessary to remove such material; that at the time said improvement was made certain other streets were in need of repair and said contractors by the direction of the board of public works, refused to deliver said gravel to appellant, but placed the same on such other streets needing repair; that no order or resolution had been made by the common council or said board for the repair of these streets, and the repairs thereof did not form a part of the general plan for the improvement of said First street; that appellant did not offer to remove or haul away any of said material, and the only demand ever made was to have the same hauled and delivered on appellant's premises; that the whole or the greater part of the earth excavated in said street was delivered by the contractors to appellant as demanded; that throughout the progress of said improvement appellee had exclusive possession of said street and material, and was in the possession of said gravel from the time it was excavated until deposited in other streets; that before bringing suit appellant demanded the gravel which was refused.

Conceding, without deciding, that the title to the material in question was in appellant, the question presented is, what right or title, as against the city, has an abutting property owner on a public street in a city to surplus earth and gravel and other materials excavated from the street in front of such property for the purpose of improving such street. It is well settled that, the other conditions being the same, the rule of law applicable to the taking of material solely to obtain material to be used elsewhere, and not for the purpose of grading or improving the place from which it is taken, is not applicable to cases where the ma-

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terial is taken for the express purpose of grading or improving the street at that point.

The case of *Anderson v. Bement*, 13 Ind. App. 248, cited by appellant's counsel, was an action against a road supervisor for wrongfully digging up and carrying away earth and gravel from within the limits of a highway. It was held the action would lie, but it did not appear that the earth and gravel were removed for the purpose of improving the highway at the place from whence they were taken; and the court expressly holds that the question presented in that case is not whether the supervisor had the right to improve one part of the highway by removing earth and gravel therefrom and depositing such material for the improvement of the highway at another point. In *Turner v. Rising Sun, etc., Turnpike Co.*, 71 Ind. 547, cited by appellant's counsel, it is held that a road supervisor has no right to open a gravel pit in a highway and remove gravel therefrom to be used on other parts of the highway, and that a turnpike company which has appropriated the highway cannot remove earth and gravel without compensation first made, or assessed and tendered. But in that case the earth and gravel were not removed for the purpose of improving the road at that point. In the *City of Delphi v. Evans*, 36 Ind. 90, 10 Am. Rep. 12, it was held that the common council of the city had no power to remove earth and gravel from one street for the purpose of filling up another street which had been ordered improved, where the removal of the earth and gravel was not for the purpose of improving the street from whence removed.

It will be seen that in each of the above cases complaint was made because of the removal of earth from a place, not itself being improved, but for the purpose of getting earth to make some other improvement, and

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this fact clearly distinguishes these cases from the case at bar. The same is true of many of the cases of other courts cited by counsel. Although the fee of a street and a public highway may be in the adjoining lot owner, and as a general proposition he retains absolute control, subject only to the public easement, yet the uses to which a street in a city may be put are greater than with respect to ordinary highways in the country. In populous cities the easement is necessarily something more than a mere right of passage. The abutting owner is still the owner of the soil, and retains his exclusive right to all mines, quarries and the like not inconsistent with the public use, and this use in a city extends to the right to construct sewers, lay water and gas mains and the like. The city has the right to do all acts necessary to the beneficial use of the street by the public. 2 Dillon Mun. Corp. (3rd ed.) sec. 688.

In some jurisdictions it is held that a city, in improving a street, may take the natural material found within its limits and use it in making such other improvements as the authorities deem best. *Bissell v. Collins*, 28 Mich. 277, 15 Am. Rep. 217; *Viliski v. City of Minneapolis*, 40 Minn. 304, 41 N. W. 1050; *Huston v. City of Ft. Atkinson*, 56 Wis. 350, 14 N. W. 444; *New Haven v. Sargent*, 38 Conn. 50, 9 Am. Rep. 360. See 2 Dillon Mun. Corp. (3rd ed.) sec. 687 and notes. But in this State the rule is declared to be that the city can remove the natural soil from one street to another only when the improvement of the two streets is embraced in one and the same general plan of improvement. In *City of Aurora v. Fox*, 78 Ind. 1, suit was brought for the wrongful carrying away of the soil of the street. It appeared from the complaint that the city, without having adopted any general plan for the improvement of the streets, and without having adver-

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tised for proposals, and without having entered into a written contract, proceeded to dig up and haul away and appropriate the soil of the street. An instruction was requested to the effect that if it appeared that the city had established the grade of the street in question, and that the common council had caused the earth to be removed from the street and had graded the same according to the plan of improvement of the street; that the work was done carefully and skilfully, doing no unnecessary injury to the abutting owner; that the owner's lot was not interfered with and that there was no malice or ill will toward the lot owner in adopting the plan and in making the improvement, the city was not liable. It was held that the instruction was erroneous in not correctly stating the law on the question of the right of the city to remove the soil from the street being improved, the court saying: "The city, as we have already said, had no right to remove the soil unless it was necessary for the improvement of the street, nor had it any right to use the earth taken from the street for any other purpose than that of grading streets forming part of the same general plan of improvement." In another part of the opinion it is said: "Where there is a general plan for the gradation and improvement of highways, intersecting streets and highways in the vicinity of the one improved are to be deemed parts of the same general plan, and soil may be removed from one and placed upon another. * * * Where the soil is removed from one street to another, it should be shown that the improvement of the two streets was embraced in and formed part of one and the same general plan." There is good reason for the limitation expressed in the rule as declared in the above case. It is well illustrated in the case at bar. By the terms of the contract and specifications the price paid the contractor included the cost of exca-

vating and removing this material from the streets to such places as appellee designated. This cost is assessed against the abutting owner. But the abutting owner is to pay his proportionate part of the whole cost of a certain improvement, and not this cost together with the cost of hauling this material to some remote place in the city for the purpose of improving some other street not contemplated in the same general plan. The basis of the assessment is the supposed benefits to the abutting property by reason of the particular improvement. If the city had the right to use this material as it did use it, it had the right to sell it or to give it to the contractor as a part of his compensation. When the earth and gravel were dug up and were no longer used for street purposes, they became the property of the abutting owner, subject only to the right of the city to use them in improving other streets under the same general plan of improvement.

When the abutting owner surrenders such rights as the public easement requires, it may be said that he impliedly agrees to surrender his right to the soil should the municipality need it in repairing or improving that particular way or system of which that is a part and which the law presumes enhances the value of his property. But this is carrying the rule to its limit, and it will not do to say that he impliedly agreed that his property might be taken by the municipality to enhance the value of the property of some one else. The city could not, as of right, take the material and use it for the purposes it did use it. So that, unless it acquired this right in some way at some stage of the proceedings, the right did not exist, and such taking was wrongful and a right of action accrued to the injured party.

But we do not think appellant could rest simply upon his right to the possession of the materials, but

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that he must take possession or show a legal excuse for not doing so. He did demand of the appellee that the material be delivered to him at a certain place. This demand he had no right to make. He did have the right to take the material away, but he had no right to require the city to remove it for him. It must be said from the findings that he knew that the improvement was being made. He knew the city had the right to make the excavation for the purpose of improving the street. It was necessary that this material be removed in making the improvement. It is true the finding shows the city was in exclusive possession of the street and material during the progress of the improvement. But this possession was only for the purpose of making the improvement, and did not excuse appellant from taking some steps to assert his own rights. He had the right to go upon the street and haul the material away as soon as it was excavated, and the city must give him a reasonable time, under all the circumstances, to do the work. It can not be said that the city had converted the material by digging it up. Appellant could have no title until it ceased to be used as a street. It does not appear that appellant was prevented by any one from removing it. He could remove it or abandon it, and as he took no steps to remove it, never offered to remove it, knew it must be removed, and had demanded that the city should remove it to a designated place for him, the city had the right to conclude that he did not intend to remove it. Under such circumstances the city had the right to treat it as having been abandoned and to use it for such streets as it saw fit.

It follows from what we have said that the second paragraph of answer is bad. But the error in overruling the demurrer was not reversible error. The court found as a fact that the gravel as it lay on First

street after being excavated and loosened, had no value of any kind, and was not worth the cost of removal. It is evident that appellant did not fail in the court below because of the defense set up in this paragraph of answer, but because of failure to prove his complaint. Upon the facts found, the appellant failed to recover independently of anything alleged in the second paragraph of answer. As we believe the judgment to be right on the facts, it cannot be reversed on intermediate errors. Sections 401, 670, Burns' R. S. 1894; Elliott App. Proc., sections 637, 638; *Walling v. Burgess*, 122 Ind. 299; *Butt v. Butt*, 118 Ind. 31; *Foster v. Bringham*, 99 Ind. 505. Judgment affirmed.

ON PETITION FOR REHEARING.

PER CURIAM.—Counsel for appellant strenuously re-argue the questions decided in the principal opinion. Nothing whatever is presented in the petition for a rehearing that was not fully considered by the court on the original hearing. We have again carefully considered all the questions raised by the petition, and there is nothing said in support of the petition calling for special notice. Counsel have presented no reason or authority, and we know of none, why the affirmance of the judgment rendered by the trial court should not stand. We are content with the original opinion, and adhere to the law of the case as therein declared on every material point. A motion is also presented and argued at length to transfer the case to the Supreme Court, on the ground that a constitutional question is involved. No such question was presented, or even suggested, in the briefs on the original hearing. After a case has been argued and decided solely upon the merits, a constitutional question cannot be raised upon a petition for a rehearing for the purpose of having the case transferred to the

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Supreme Court. It is a very familiar rule that new questions will not be considered by the appellate tribunal on petition for rehearing. And it has also been held that questions not urged in argument before the decision in the cause will not be considered after a rehearing has been granted on other grounds. *Wasson v. First Nat'l Bank*, 107 Ind. 206; *Danenhoffer v. State*, 79 Ind. 75; *Emerson v. Opp*, 9 Ind. App. 581; *Johnson v. Jones*, 79 Ind. 141, and cases cited; *Louisville, etc., R. W. Co. v. Hicks*, 11 Ind. App. 588.

The petition for a rehearing and the motion to transfer are overruled.

THE PENINSULAR STOVE COMPANY v. ELLIS, ASSIGNEE,
ET AL.

[No. 2,517. Filed June 28, 1898.]

REPLEVIN.—*Possession*.—*Special Verdict*.—Where the special verdict shows that defendants were not in possession of the property in question a judgment thereon in replevin is unwarranted. p. 493.

ASSIGNMENT FOR BENEFIT OF CREDITORS.—*Conversion*.—An assignee for the benefit of creditors is not a purchaser for value as against a defrauded seller of the goods assigned, and the refusal of the assignee to surrender the goods to the seller amounts to a conversion. p. 495.

SAME.—*Fraud*.—*Conversion*.—*Salés*.—A purchase of goods by one who at the time of the purchase knew he was not able to pay for them, and intended not to pay for them, is such a fraud as will entitle the vendor to avoid the sale, although there was no fraudulent representation made, and an assignment of such goods for the benefit of creditors amounts to a conversion. pp. 495, 496.

From the Steuben Circuit Court. *Reversed*.

Sol. A. Wood, for appellant.

Brown & Davis, *Frank M. Powers* and *W. G. Coxton*, for appellees.

COMSTOCK, J.—The complaint is in two paragraphs. The first in replevin; the second for conversion. The cause was put at issue, submitted to a jury, and upon

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proper request, a special verdict returned. No question is presented on the pleadings.

On the special verdict the court rendered judgment in favor of plaintiff against appellee Snyder for the possession of the property, and overruled its motion as against the other appellees, and rendered judgment in favor of defendants Russell, Croxton and Wickwire for the return of the property, or upon failure of plaintiff to return the property,—judgment for \$231.00, the amount found by the jury to be the value thereof, and that they recover of the plaintiff their costs. Plaintiff moved to modify the judgment so as to make the same in its favor as against Croxton, Russell and Wickwire against Snyder for the value of the property converted by him, and for all costs in the cause, which motion the court overruled.

The assignment of errors challenges the action of the court in overruling the motion for judgment against the several appellees, and its motion to modify the judgment, and in rendering judgment in favor of appellees on the special verdict. The special verdict shows that appellee, at the time of ordering the goods in controversy, was and had been for years, in business as a retail dealer in stoves and hardware; that on the 9th of April, 1894, he ordered the goods of plaintiff's agent for the purpose of selling them at retail; that they were delivered August 15, and placed in his store as a part of his stock. On September 3, 1894, appellees Russell, Croxton, and Wickwire, being among his *bona fide* creditors to the amount of \$2,999.03, he executed to them a chattel mortgage upon his merchandise, including stoves purchased and received of plaintiffs, to secure said indebtedness, which was evidenced by promissory notes. When defendant Snyder purchased the goods of plaintiff, he was insolvent, and was not able, and intended not to

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pay for them. On September 5, he made a deed of assignment, conveying all his property to appellee Ellis, assignee, for the benefit of his creditors. Ellis, assignee, was afterwards succeeded by Gates, appellee, as assignee. Snyder's indebtedness, aside from that provided for by said mortgage, was \$8,576.29. At the time said appellees, Russell, Croxton, and Wickwire received said mortgage, they had no knowledge or notice that said Snyder had purchased said goods with the fraudulent intent of not paying for them. Plaintiff's agent demanded of each of the defendants the goods in controversy before the commencement of this suit. It does not appear from the special verdict that there was any disaffirmance of the sale, or any claim of fraud made prior to the execution of the mortgage and the deed of assignment.

By his deed of assignment for the benefit of his creditors, Snyder had divested himself of all title to the property. He was not, at the time of the commencement of this action, in possession thereof, nor claiming title thereto, nor were either of the appellees, nor were they or either of them detaining the same so far as appears from the special verdict, and in a special verdict nothing is taken by intendment. A judgment in favor of appellant in replevin would not, therefore, have been warranted by the findings of the jury. It remains to be determined whether it was entitled to judgment for conversion.

Benjamin on Principles of Sales, at page 107, states the following to be the rule of law applicable to fraudulent sales: "When a person obtains possession of goods, with the intention by the owner to transfer to him both the property and possession, although the buyer has made a false and fraudulent representation in order to effect the contract or obtain the possession, the property vests in him as buyer until the defrauded

owner has done some act to disaffirm the transaction: and the legal consequence is, that if before the disaffirmance the fraudulent buyer has transferred, either the whole or a partial interest in the goods to an innocent transferee for value, the title of said transferee is good against the defrauded owner." See authorities cited on same page. In *Thompson v. Peck*, 115 Ind. 516, our Supreme Court by Mitchell, J., said: "It is well settled that even though a sale of property be induced by fraud, the contract is not void, but only voidable. The title to the property passes to the fraudulent vendee, subject to the right of the vendor, upon discovering the fraud, to elect whether he will rescind the contract by returning, or offering to return, whatever of value he may have received, and reclaim his property, or whether he will retain the consideration and treat the bargain as subsisting. Until the vendor makes his election the contract continues and the title of the property remains in the purchaser as against all the world. *Powers v. Benedict*, 88 N. Y. 605."

In *Curme, Dunn & Co. v. Rauh*, 100 Ind. 251, the Supreme Court, by Mitchell, J., says: "But where there is an absolute sale and delivery of personal property by the owner to the vendee, and the sale is merely voidable on account of fraud in the vendee, such vendee may transfer a good title by a sale made to a *bona fide* purchaser for value."

The special verdict shows that the goods in controversy were sold to appellee Snyder to be sold by him at retail, in the ordinary course of his business as a stove and hardware merchant; that the mortgagees had no knowledge of the facts attending the purchase of the goods, or the fraudulent intention with which they were purchased, and that the mortgage was executed to them for a valuable consideration, money

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loaned after the purchase, and time of payment extended on an antecedent debt. So that, if conversion had been a fact, in issue, the findings would not have established it. But the several demurrers filed by the mortgagees to the paragraph of conversion were sustained by the court, and as to them conversion was not an issue in the cause. It is clear, therefore, that it would have been error for the court to have rendered judgment against the mortgagees either in replevin or for conversion.

It remains only to determine the liability, upon the facts found by the special verdict, of the assignor and his assignee on the second paragraph of complaint. Had Snyder retained possession of the goods, and refused upon demand to surrender them to the seller, this sale being fraudulent, that refusal would have been a conversion. The assignee and assignor occupy the same relation with reference to the seller. A refusal upon the part of the assignor would also be a conversion. An assignee for the benefit of creditors is not a purchaser for value as against the defrauded owner. See Benjamin on Principles of Sales, p. 108; *Dugan v. Nichols*, 125 Mass. 43; *Nichols v. Michael*, 23 N. Y. 264; *Busing v. Rice*, 2 Cush. 48; *Donaldson v. Farwell*, 93 U. S. 631; *Ratcliffe v. Langston*, 18 Md. 383; *Yeatman v. Savings Inst.*, 95 U. S. 764; *Union Trust Co. v. Trumbull*, 137 Ill. 146, 179, 27 N. E. 24; *Farley v. Lincoln*, 51 N. H. 577; *Rogers v. Whitehouse*, 71 Me. 222; *Singer v. Schilling*, 74 Wis. 369, 43 N. W. 101.

The assignment was, therefore, as against the seller, and except as to *bona fide* purchasers for value, a conversion. Counsel for appellee argue that the alleged fraudulent representation, artifice, and concealments, which the jury found constituted the fraud which in-

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duced appellant to make the sale, were not such concealments or such representations as warrant the conclusion of fraudulent intent. But the jury found as a fact, which it was its province to do, that the vendee, at the time he purchased the goods, was not able to pay for them, knew that he was not able to pay for them, and intended not to pay for them.

In Benjamin on Sales (3rd ed.), note c, page 423, it is said: "It is settled in the American courts, by a vast weight of authority, that a purchase of goods by one who, at the time, intends not to pay for them, is such a fraud as will entitle the vendor to avoid the sale, although there were no fraudulent representations or false pretences." Citing *Barnard v. Campbell*, 65 Barb. 286; *King v. Phillipps*, 8 Bosw. 603; *Wiggin v. Day*, 9 Gray 97; *Peters v. Hilles*, 48 Md. 506; *Thompson v. Rose*, 16 Conn. 71, 81; *Talcott v. Henderson*, 31 Ohio St. 162; *Bidault v. Wales*, 19 Mo. 36; *Redington v. Roberts*, 25 Vt. 694; *Nichols v. Michael*, 23 N. Y. 264, and many other cases. So that upon the finding alone that appellee Snyder intended not to pay for the goods, the appellant had a right of action, either in replevin or for conversion. The special verdict is contradictory, indefinite, and uncertain. We have concluded that the ends of justice will be better subserved by a new trial than by a modification of the judgment.

The judgment is therefore reversed, with instructions to the trial court to retry the cause.

THE STATE v. BUSKIRK.

[No. 2,580. Filed Dec. 15, 1897. 'Rehearing denied June 28, 1898.]

INTOXICATING LIQUORS.—*Quart Shop Law*.—*Penalty*.—The provision of section 2186, Burns' R. S. 1894, fixing a penalty of not more than \$200.00 nor less than \$5.00 for the transaction of any business or the

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performance of any act without license, when a license is required by any law of this State, applies to the act of March 8, 1897 (Acts 1897, p. 253), known as the Quart Shop Act in which no penalty is fixed for the violation of the provisions thereof.

From the Montgomery Circuit Court. *Reversed.*

William A. Ketcham, Attorney-General, *Dumont Kennedy* and *Merrill Moores*, for State.

Wright & Seller, *William P. Breen* and *John Morris, Jr.*, for appellee.

BLACK, J.—A prosecution was instituted by information against the appellee for selling malt liquor without a license, the charge being that he, at, etc., on, etc., “did then and there unlawfully sell, for the purpose of gain, a certain quantity of malt liquor, to wit, lager beer, to one Mathias Yearion, in a less quantity than five gallons at a time, to wit, one quart, he, the said Buskirk, not having at the time a valid license under the laws of said State to so sell malt liquor as aforesaid,” etc.

Upon application of appellee for a change of judge, a special judge was appointed. On motion of the appellee, the court quashed the affidavit and information, and this action of the court is assigned as error. It is agreed that the sale charged is by statute declared to be unlawful, yet it is contended on behalf of the appellee that no penalty is by law provided for such violation of the statute; that is, that there is no penalty for the sale of such liquor without a license, except where the sale is in less quantity than a quart at a time, or the liquor is sold to be drunk on the premises where sold. By section 1 of the act of March 17, 1875, Acts 1875, Spec. Sess., p. 55 (section 7276, Burns’ R. S. 1894, 5312 R. S. 1881), it was made unlawful for any person directly or indirectly to sell, barter or give away, for any purpose of gain, any spirituous, vinous

or malt liquor, in a less quantity than a quart at a time, without first procuring from the board of commissioners of the county in which such liquor was to be sold, a license, as thereafter in said act provided, and that no person, without having first procured such license, should sell or barter any intoxicating liquor to be drunk or suffered to be drunk, in his house, out-house, yard, garden or the appurtenances thereto belonging. Section 5 of said act of 1875 (sec. 7281 Burns' R. S. 1894, 5316, R. S. 1881), provided that if the applicant for a license desired to sell spirituous, vinous and malt liquors in quantities less than a quart at a time, he should pay the treasurer of the county \$100, as a license fee for one year, before license should issue to him, and if he desired to sell only vinous or malt liquors, or both, in quantities less than a quart at a time, he should pay to the treasurer of said county \$50 as a license fee for one year, before the license should issue to him, etc. Section 7 of said act of 1875 (sec. 7283 Burns' R. S. 1894, 5318 R. S. 1881), provided that upon the doing of certain things designated, the county auditor should issue a license to the applicant for the sale of such liquors as he applied for, "in less quantities than a quart at a time, with the privilege of permitting the same to be drunk on the premises," etc.

Section 12 of said act of 1875 (sec. 7285 Burns' R. S. 1894, 5320, R. S. 1881), provides as follows: "Any person, not being licensed according to the provisions of this act, who shall sell or barter directly or indirectly, any spirituous, vinous, or malt liquors in a less quantity than a quart at a time, or who shall sell or barter any spirituous, vinous or malt liquors to be drunk, or suffered to be drunk, in his house, out-house, yard, garden or the appurtenances thereto belonging, shall be deemed guilty of a misdemeanor,

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and, upon conviction thereof, shall be fined in any sum not less than twenty dollars nor more than one hundred dollars, to which the court or jury trying the case may add imprisonment in the county jail of not less than thirty days nor more than six months."

By an act of March 8th 1897, sections 1, 5 and 7 of said act of 1875 were amended (Acts 1897 p. 253, sections 7276, 7281, 7283, 4 Burns' R. S. 1897). The only substantial change in section 1 was the omission of the words, "in less quantities than a quart at a time." Section 5 was amended so as to read as follows: "If said applicant desire to sell spirituous, vinous and malt liquors, he shall pay the treasurer of said county one hundred dollars, as a license fee for one year, before license shall issue to him; such fees shall be paid into the school fund of the county in which such licenses are obtained." In the amended section 7, it is provided, that on compliance with certain specified prerequisites, "the county auditor shall issue a license to the applicant for the sale of such liquors as he has applied for, with the privilege of permitting the same to be drunk on the premises," etc., "which license shall specify the name of the applicant, the place of sale, and the period of time for which such license is granted: *Provided*, that none of the provisions of this act shall apply to any person engaged in business as a wholesale dealer, who does not sell in less quantities than five gallons at a time."

Section 12 above quoted, has not been amended, and there is no other statutory provision specifically prescribing punishment as for a crime for the sale of intoxicating liquors without a license, or specifically denominating such sale as a misdemeanor. But section 12 provides a penalty, upon conviction, for a sale or barter by one not licensed, only when the quantity sold or bartered is less than a quart, or when the

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liquor is sold or bartered to be drunk or suffered to be drunk in his house, etc.; and it denominates only such a sale as a misdemeanor.

The learned prosecuting attorney, arguing for the State, contends that the penalty provided by this section 12 should be carried into the sections as amended in 1897, and should be regarded as applicable to an unauthorized sale of a quart of malt liquor. His remarks would seem to be directed in favor of a construction of the statute based upon a conjectured purpose of the legislature, rather than of a construction based upon the intention as expressed in the language employed. With all the various aids to interpretation and construction that may properly be employed by the courts, they cannot extend a statutory punishment for crime to an act clearly outside of the meaning of the language used by the legislature in describing the offense.

It has frequently occurred that the legislature has declared an act unlawful for which it has not provided a specific penalty. To provide for such instances in one direction, doubtless, our general statute of 1881 concerning crimes contains, in section 249 thereof, the following, being section 2186 Burns' R. S. 1894, (2090 Horner's R. S. 1897): "Whoever, by himself or agent, transacts any business or does any act without a license therefor, when such license is required by any law of the State, shall be fined not more than two hundred dollars nor less than five dollars." An offense against the criminal law so punishable would be a misdemeanor. Section 1642, Burns' R. S. 1894 (1573 Horner's R. S. 1897). To find instances to which this provision is applicable, manifestly we must look to other statutes. In *Keiser v. State*, 78 Ind. 430, it is held that this section 249 of said act of 1881 did not repeal said section 12 of the liquor law of 1875; and that said

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section 249 is to be construed as applying to any transaction, business or trade for which the law requires a license without providing a special penalty for failing to obtain it. The decision in *Walter v. State*, 105 Ind. 589, was in agreement with this view. There, it was said: "The statutes of this State on the subject of the sale of intoxicating liquors have always been, as they still are, special and exceptional. Section 5320 [being said section 12 of the act of 1875] is, consequently, not inconsistent with, or repealed by, the subsequent enactment of section 2090 [being said section 249], the provisions of which ought to be construed as having reference to classes of business other than the sale of intoxicating liquors." This was said with reference to the liquor law as it was when *Walter v. State*, *supra*, was decided, in 1886. If any sales of intoxicating liquors without license be now made unlawful, for which no penalty is fixed by the statutes on the subject of the sale of intoxicating liquors, then these statutes are so far not special, and, therefore, the view that to such sales said section 2090 may be held applicable receives support from the case just mentioned.

Without proceeding upon any mere speculation as to the probability that the legislature would not do the useless thing of declaring an act unlawful without providing any penalty, and thereupon applying a penalty provided for other offenses, as suggested in argument, we find that a statute already in existence covered, with a penalty thereby prescribed, the act in question, so characterized by the legislature in 1897. The judgment is reversed, with instruction to overrule the motion to quash the affidavit and information.

KELLER v. GASKILL ET AL.

[No. 2,829. Filed April 28, 1898. Rehearing denied June 28, 1898.]

APPEAL AND ERROR.—*Law of Case.—Pleading.*—A holding by the court in a former appeal of the cause in the consideration of the special verdict, that certain facts therein found amounted to negligence on the part of defendant, constitutes the law of the case as to subsequent pleadings therein in which such acts of negligence were properly pleaded. *p. 504.*

SPECIAL VERDICT.—*Master and Servant.—Damages for Personal Injuries.*—A special verdict in an action for personal injuries found that plaintiff, a boy about eighteen years of age, who was employed in defendants' factory to assist in making dental supplies was required by defendant to run the engine and instructed to report to certain other employes who had formerly run the engine anything which he might observe to be out of repair, and to follow the advice of such employe relative thereto; that plaintiff observed that a belt was worn and had begun to break, and reported the same to one of such employes, who instructed him to remove the belt and repair the same, and in attempting to remove the belt, without stopping the engine, he was caught by a set-screw in a revolving shaft, and injured; that plaintiff was not instructed to stop the engine before removing the belt, although he had seen the engine stopped on a previous occasion for the purpose of removing the belt. The jury found that the shaft was revolving at the rate of 240 revolutions a minute, and that plaintiff could not see the set-screw, and did not know of the existence thereof, although he had oiled the bearings on the line shaft within three inches of the set-screw once a day for about three weeks prior to the accident. *Held*, that there was not such ambiguity in the verdict as to render it insufficient to sustain a judgment for plaintiff. *pp. 505-511.*

MASTER AND SERVANT.—*Fellow Servant.*—The question whether or not the facts exist which make two or more employes fellow servants is a question of fact, but when such facts are found it becomes a question for the court to determine whether or not those facts bring the matter within the legal definition of a fellow servant. *p. 512.*

DAMAGES.—*Assessment.—Jury not Required to Itemize.—Practice.*—No error was committed in refusing to submit certain interrogatories to the jury inquiring concerning the several amounts allowed as separate items in the assessment of damages in an action for damages on account of personal injuries sustained by plaintiff while in the employ of defendant. *p. 513.*

Keller v. Gaskill *et al.*

From the DeKalb Circuit Court. *Affirmed.*

S. F. Swayne and *A. A. Chapin*, for appellant.

E. V. Harris and *F. S. Roby*, for appellees.

BLACK, J.—On a former appeal in this cause it was determined that in the special verdict then under consideration it was not sufficiently shown that the plaintiff was free from contributory fault. *Keller v. Gaskill*, 9 Ind. App. 670. Upon a return of the cause for a new trial, it having been suggested that the plaintiff, Frank Gaskill, had reached his majority, his next friend was discharged, and thereafter the cause was prosecuted by the plaintiff in his own name alone, against the original defendant, Josiah O. Keller, now the appellant, and Anna Keller, who was made an additional defendant in an amended complaint in two paragraphs. The issues formed were tried by jury, and a special verdict was returned.

A motion of the defendant Anna Keller for a new trial was sustained. A like motion of the defendant Josiah O. Keller was overruled, and judgment was rendered against him on the special verdict. He appeals, naming his codefendant and the plaintiff as appellees in the assignment of errors. The overruling of the joint demurrer of the defendants to each paragraph of the second amended complaint being assigned as error, it is claimed in argument that neither paragraph of the complaint stated facts sufficient. The learned counsel for the appellant suggest that both paragraphs of the complaint are objectionable on the ground that neither shows such a condition as made it obligatory upon the appellant to warn the plaintiff of his hazardous attempt, and that neither shows that he was free from contributory negligence. On the former appeal it was decided that the second paragraph of complaint was sufficient to withstand a

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demurrer. Upon comparison of that paragraph (which is shown by the record now before us) with the second paragraph as last amended, we do not find any substantial difference between them upon the matters to which the appellant's objections are directed. In the appellant's brief it is stated that the first and second paragraphs are substantially alike, except that while the first proceeds upon the theory that the defendants set the plaintiff, a minor, to work at that which he was not employed to do, the second paragraph proceeds upon the theory that he was injured while discharging the duties of his employment. There could, therefore, be no substantial difference in the particulars embraced in appellant's criticism. Upon the former appeal, the court, in discussing the special verdict, said: "It sufficiently appears, however, that shifting and repairing the belts, even those connected with the lathe upon which we may assume he was at work, was such employment in connection with the revolving machinery as required special instructions and admonitions to the appellee in order to make him comprehend the hazard and peril to which he was thereby exposed. These the jury find he had not received, and, as we have already said, this omission, coupled with the act of appellant in ordering the appellee to perform this class of work under such circumstances, constituted negligence in the appellant." This conclusion of the court on the former appeal is the law of the case relating to the matter to which it pertains, and each paragraph of the complaint sufficiently shows such a condition as made it, under that decision of this court, obligatory upon the appellant to warn the plaintiff of the danger.

It is alleged in each paragraph that the plaintiff was free from fault, and in view of the allegations concerning his youth and inexperience and the nature

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of the employment, we cannot say that the allegations of particular facts overcome the general averment of his freedom from fault. We may refrain from setting out the pleadings, inasmuch as the real contest between the parties is presented upon its merits in the special verdict.

The facts were shown by the special verdict substantially as follows, omitting some matters relating only to the defendant Anna Keller: The defendants owned and conducted at Fort Wayne, Indiana, a manufacturing establishment, engaged in making dental tools and appliances. At and before the time of plaintiff's injury the factory consisted of a large four-story building, in which there was a steam engine, by which power was supplied to run and operate machinery, shafts, belts, pulleys and appliances which were in the factory. In July, 1890, the plaintiff, then about seventeen years and eight months of age, applied for employment in the factory to the defendant Josiah O. Keller, who in all matters relating to the employment and direction of the plaintiff, acted for himself and his codefendant, and as general manager. The defendants in said factory, made dental engine burrs, the manufacture of which required skilled labor, and constituted a trade by itself; and the plaintiff applied for employment to learn that trade. Within three days thereafter the plaintiff's father went to the defendant Josiah Keller, and conferred with him relative to the employment of the plaintiff to learn that trade, and said Josiah then took plaintiff's father into the room where such dental engine burrs were made and showed him what the work of making them consisted of; and it was thereupon agreed by the parties that the plaintiff should be taught that trade, and that he should at once begin work on the easier and simpler branches of the trade, and that as his skill in-

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creased, he was to be advanced to the more difficult and artistic grades of said trade and employment, until he should become proficient therein, and that during the first two weeks he should receive no remuneration for his services except such instruction, and that after the first two weeks he was to receive as compensation for his labor \$2.00 per week in addition to such instruction. The work for the doing of which the parties so contracted was light work, unattended with danger. The plaintiff, upon such employment, and with the consent of his father, began to learn said trade. About three weeks after he entered upon such employment, he was required by the appellant to do work in the factory other than that embraced in said agreement, and the appellant then ordered and required him to do other and more hazardous work than that pointed out to the plaintiff and his father when the employment began. The plaintiff's father did not know of such change of employment. At the time of his injuries complained of, the plaintiff, in pursuance of the orders of the appellant, was acting as engineer in the factory, and as such was charged with the duty of running said engine, and the duty of oiling it and the line shafting, and the duty of repairing the belts. At the time of the injury he was not engaged in any work or duty connected with the trade of making dental engine burrs. Before he was ordered to do this other work, it had been done by two separate other employes, Thomas Corpenning and John Lipes. The appellant, when he set the plaintiff to do this other work, directed him to report to Corpenning or Lipes anything which he might observe to be out of repair, and that they would fix it or have it fixed, and that the plaintiff should, in that behalf, do what Corpenning or Lipes told him to do; and Corpenning and Lipes were each given the power to determine whether

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any such repairs should be done by them, or any one of them, or to order it done. The appellant directed the plaintiff to obey the orders of either Corpenning or Lipes in that behalf. When the appellant was not personally present, Corpenning and Lipes had authority and direction to act for the defendants in regard to ordering or making any needed repairs of the belts, shafts or appliances connected with said engine, and any directions given to the plaintiff in that behalf were given by Corpenning or Lipes for the defendants, in their place and by their authority. On the 8th of September, 1890, the plaintiff was engaged in the line of duty enjoined upon him by the defendants different from and other than the making of dental engine burrs, when a belt, which extended down from a pulley on a line shaft, in the factory, to a small pulley used on a lathe therein, began to break and ravel, and was out of repair. Upon discovering this, the plaintiff reported the facts to Corpenning, and was by him, acting for the defendants, ordered to go and fix said belt himself. In compliance with this order, the plaintiff proceeded to take off said belt for the purpose of repairing it. In taking it off and in attending to the repair thereof he acted in the line of the duty required in his employment as engineer, and exercised his best skill and judgment. While he was thus proceeding, the engine from which power was had was not slackened in speed. He was not instructed to stop the engine when repairing belts and pulleys. Corpenning had full knowledge of the manner in which the plaintiff was proceeding to remove the belt and make the repairs, but did not object, or point out a better way to perform said duty. The plaintiff was ignorant of the proper and safe manner in which to do said work, which was dangerous and hazardous to life and limb. The plaintiff was too young and immature and inex-

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perienced to know and fully appreciate or understand the danger and hazard connected with the work so undertaken and required of him. He was ignorant of and uninstructed as to the risk and peril connected with the removal of the belt and the shifting thereof. On said line shaft, near said pulley, there was a set-screw, which was set in a collar running around said line shaft, and attached to it by said set-screw, which projected from one-half inch to one inch and a quarter. In view of the plaintiff's tender age, inexperience, and the other circumstances of the situation, reasonable and ordinary care (it was found by the jury) required that he should have been instructed and cautioned by his employer. No such instructions were given him. The line shaft, collar and set-screw were revolving at a rate of 240 revolutions per minute at the time of the plaintiff's injury, and prior thereto. The plaintiff at said time did not know that the set-screw was, by its rapid revolution and location, substantially obscured from view, and did not know that it was located at said place. The set-screw was not seen by him, owing to his position and occupation and its rapid revolution. He was fully occupied in attempting to change the belt on the line shaft. During all the time after the broken belt came to his notice until his injury he was exercising such care, caution and prudence as persons of his age and capacity would and do exercise under the circumstances. It was further found that the plaintiff's injuries were received by reason of the negligent acts and omissions of the defendants as set out in these findings, and without fault on his part. It was found that the belt was not connected with the lathe which had been first assigned to the plaintiff to work at in making dental engine burrs, that, if the plaintiff had been instructed as to the proper and usual method of removing belts from the pulley on

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the line shaft, no risk would have been incurred, and no injury would have happened to him. While he was trying to catch hold of the belt and to shift it to the other side of the pulley, the coat sleeve of his left arm was caught by said set-screw, rapidly revolving, and his arm was thereby twisted around the line shaft. His arm was thereby broken, lacerated and crushed, and he was thereby caused great pain of body and anguish of mind, put in peril of his life, and permanently disabled. It was further found, that in all he did and omitted to do in the premises, the plaintiff exercised the skill which he possessed, and acted with reasonable care, under the circumstances. He was without experience in running engines or repairing and operating the machinery and belts driven thereby, previous to his employment by the defendants. He possessed only such judgment, prudence and skill as are generally and ordinarily possessed by inexperienced boys of his then apparent age, which was from fourteen to fifteen years of age. The defendants knew and had full opportunity to know the apparent age and actual ability of the plaintiff at said time. No instructions were given him by either of the defendants relative to the hazard and danger connected with the duties enjoined upon him, or the manner of avoiding them. It was found that the plaintiff was damaged by the injury so received in the sum of \$2,450.00.

It was further found that the plaintiff did not know, before he was injured, that the set-screw and collar were on the line shafting; that they were open to view, so that they could have been seen if he had looked; that he did not voluntarily proceed to repair the belt when he was injured; that at the time of his injury he attempted to throw the cord belt across to the other side of the pulley; that when he did so he put his arm over the set-screw, which was revolving on the line

shafting, that the set-screw was not in full view at the time he so put his arm over it. It was found that the plaintiff, at the time of his injury, possessed ordinary capacity; that he might not, with the use of ordinary care and prudence, have repaired the belt operating the lathe at which he was at work without going up to the line shaft; that it was necessary for him to go up to the line shaft, in order to repair the belt that was broken; that Corpenning ordered him to go upon the ladder to the line shaft to repair the belt. He was in possession of sufficient intelligence to know and did know, that, if his coat sleeve on his arm was caught on the set-screw of the revolving shaft, it would be liable to injure him. He had oiled bearings on the line shaft at a point within three inches of the set-screw, once every day for about three weeks before the injury. The appellant was informed of the plaintiff's age when his father went to the factory a few days after the plaintiff commenced work, and knew he was seventeen years and eight months old. It was further found that at the time of the injury the plaintiff possessed ordinary intelligence; that he possessed the usual intelligence and capacity of boys of his age; that if he had stopped the engine at the time he attempted to throw the belt across the pulley, the injury would not have occurred; that the plaintiff had frequently stopped the engine; that it was not dangerous to attempt to do so; that just before the injury he could have stopped the engine without incurring any danger; that there was nothing to prevent him from thus stopping the engine; that he did not make an examination of the set-screw before he was injured; that there was nothing to prevent him from making such examination; that he could have seen the set-screw if he had looked; that he did not look to see it before he was injured; that he knew the line shaft was re-

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volving over 200 revolutions per minute; that he was in charge of the engine which furnished the power to run the line shaft; that he could have stopped the engine if he had so desired; that he possessed good eye sight, and his natural faculties were unimpaired. It was further found that it was the duty of Lipes and Corpenning to make dental engine burrs, and the latter also had the duty of acting in the capacity of foreman, and the former of acting as foreman or overseer; that the plaintiff was not instructed by Corpenning not to attempt to repair the belt without stopping the engine; that the plaintiff consented to a change of employment; that he saw a cord belt repaired on the buffing lathe near where he was injured a few days before the injury, and that the engine was stopped at the time it was so repaired.

The appellant's motion for a *venire de novo* was overruled. It is contended on behalf of the appellant that the findings are contradictory. The verdict was rendered by way of answering interrogatories submitted to the jury at the request of the attorneys. It is quite lengthy, and manifests much labor on the part of the able attorneys who prepared the interrogatories. In view of the claim of want of consistency in the answers of the jury, we have taken the great space necessary to substantially exhibit the findings. We think there is no such ambiguity as to render the verdict insufficient to sustain a judgment. As has been frequently said by our courts of appeal, special verdicts should not be subjected to such nice criticism as to defeat justice. All the parts should be considered together, with a view to harmonize them, if this be possible, without violating the apparent sense of any material finding when so compared with all other parts of the verdict. Without taking space to particularize,

we think that a careful examination of the whole verdict will fail to disclose any material contradictions.

A motion of the defendants for a new trial was overruled. It appears that of the Interrogatories proposed by counsel for defendants to be answered by the jury in returning a special verdict the court refused to so submit to the jury the following: "Was Thomas Corpenning a co-employee with the plaintiff at the time of the injury?" It was plainly shown by answers given by the jury to other interrogatories submitted by the court that the plaintiff was an employee of the defendants, and that Corpenning also was their employee; and it was in like manner shown in what capacity and in what relation to each other they worked. It was shown that they were both employees of the defendants; that they were co-employees. It could not have benefited the appellant to have obtained an answer to the question concerning Corpenning which was rejected. Perhaps no more need be said, but the question whether or not the facts exist which make two or more persons fellow servants in the legal sense is a question of fact, but the definition of a fellow servant in that sense is a matter of law. When the facts have been put beyond dispute by the finding of the jury in a special verdict, it then becomes a question for the court to determine whether or not those facts bring the matter within the legal definition of a fellow servant. *Dube v. City of Lewiston*, 83 Me. 211, 22 Atl. 112; *Dealey v. Philadelphia, etc., R. R. Co.*, 16 Phil. 122; *Lake Eric, etc., R. R. Co. v. Middleton*, 142 Ill. 550, 32 N. E. 453. It may be also said here, as was said in *Atlas Engine Works v. Randall*, 100 Ind. 293, 50 Am. Rep. 798: "The master having subjected the servant to the command of another without information or caution with respect to all such obligations as the

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master owes, the other stands in the master's place, and this is so notwithstanding the two servants are, as regards the common employment, fellow servants."

The refusal to submit certain other interrogatories, inquiring concerning the several amounts allowed by the jury as separate items in the assessment of damages, is presented as ground for a new trial. In *Ohio, etc., R. W. Co. v. Judy*, 120 Ind. 397, an action to recover damages for physical injury suffered through the defendant's wrongful act, it appears from the opinion of the court that interrogatories were submitted "requiring the jury to itemize the damages allowed, stating how much they allowed for humiliation and mortification, how much for mental suffering, how much for physical suffering, and so on, with the different items for which damages are assessable, and answers were made to these interrogatories."

The Supreme Court held that this was not proper practice, that "damages were assessable for all the injuries sustained, and the jury cannot be required to itemize and assess a separate amount for each element entering into and making up the gross sum allowed. As well it might be required of the plaintiff in his complaint to set forth the particulars of his claim for damages, alleging what amount of damage he sustained by reason of mental suffering, and what on account of physical suffering. This certainly could not be required in pleading, neither can it be required of a jury to assess the damage for each separately in a case of tort." The court in that case refused to consider the separate items stated by the jury in answer to interrogatories. The items concerning which inquiries were proposed in the case at bar were such as need not be specially pleaded, and, under the authority of the case last mentioned, we are constrained to hold

that there was no available error in refusing to require the jury to itemize the damages.

It is claimed for the appellant that some of the findings in the special verdict were not sustained by sufficient evidence, but we are of the opinion that we could not reverse the judgment upon that ground without invading the province of the jury and the trial court.

Finally, it is insisted that there was error in overruling the appellant's motion for judgment on the verdict. The portion of the opinion of this court upon the former appeal quoted above relating to the negligence of the appellant, is applicable to that branch of the case as presented by the verdict now under review, which, by its statement of facts, shows a duty on the part of the appellant toward the plaintiff, and the injury of the latter through the failure of the former to discharge that duty.

The former judgment was reversed for the reason, as already stated, that it was not sufficiently shown by the special verdict then before the court that the plaintiff was not chargeable with contributory negligence. We think that fault in the verdict has been sufficiently remedied on the last trial. On the former appeal it was said by the court: "We fully agree with the appellee's learned counsel that, under the peculiar circumstances, as to age, experience, etc., of the appellee, the question of contributory negligence is one for the jury. * * * We are furthermore disposed to adopt the definition of what constitutes due care in a case like this, as given by appellee's counsel from the cases cited by them, viz: 'Just such care as boys of that age, of ordinary care and prudence, would use under like circumstances,' and 'that a child is held to no greater care than is usually possessed by children of the same age.' But although a boy of the age of appellee is not required to use as much care as an

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adult, nor more, perhaps, than such as is commensurate with his maturity and capacity, it can not be claimed that he is not required to exercise reasonable care according to the circumstances. Had the jury found that appellee had done this, it being a question peculiarly within their judgment, we would not feel authorized, for this reason, to disturb their verdict."

Counsel for the plaintiff seem to have been guided by these suggestions. The facts relating to plaintiff's situation, capacity, and conduct are fully stated, and the jury found it to be "a fact that during all the time after said broken belt came to his notice until his injury the plaintiff was exercising such care as persons of his age and capacity would and do exercise under the circumstances." It was also stated by the jury to be "a fact that in all he did and omitted to do in the premises plaintiff exercised the skill which he possessed, and acted with reasonable care under the circumstances," and that he "possessed only such prudence, judgment, and skill as are generally and ordinarily possessed by inexperienced boys of his apparent age," which "was from fourteen to fifteen years of age." The special verdict seems to fulfil the requirements of the decision of the case on the former appeal. The judgment is affirmed.

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[No. 2,528. Filed June 29, 1898.]

PLEA IN ABATEMENT.—*Appeal and Error.*—*Assignment of Error.*—*Sufficiency of Complaint.*—A demurrer to a plea in abatement does not reach the record, and cannot be carried back and sustained to an insufficient complaint, and the sufficiency of the complaint cannot be considered on appeal on an assignment of error based upon the action of the court in overruling such demurrer. *pp. 517-519.*
SAME.—*Dilatory Pleas.*—A plea in abatement is a dilatory plea, and is not regarded favorably by the courts. *p. 519.*

PROCESS.—*Nonresident Corporations.*—*Jurisdiction.*—Under the provisions of sections 313 and 316, Horner's R. S. 1897. the court ac-

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quires jurisdiction of a cause of action arising in this State against a foreign corporation doing business in this State, by service of process upon its superintendent who at the time was in this State as the agent and representative of the corporation, and engaged in the transaction of business for it, although a resident of another state. *pp.* 519-534.

From the Marion Superior Court. *Reversed.*

William A. Ketcham and *Frederick E. Matson*, for appellant.

J. E. Scott and *Albert Rabb*, for appellee.

WILEY, J.—Appellants sued appellee to recover damages for the alleged failure of a warranty, made by appellee to appellants, upon a cob-grinding machine purchased by the latter from the former. Summons was issued and served on J. F. Winchell, superintendent of appellee. Appellee appeared specially and moved to quash the return to the summons, which motion was overruled. Appellee, still appearing specially, filed its plea in abatement. In this plea it was averred that appellee was a corporation organized and existing under the laws of Ohio; that its principal office was in Clarke county, Ohio; that it was not, and is not incorporated in Indiana; that it did not and does not now, maintain any office in Indiana, and that its officers were then and now are, nonresidents of the State of Indiana, and did then and do now, reside in Springfield, Ohio; that said Winchell, upon whom said summons was served, was not at the date of said service, nor has he since been a resident of Indiana, and that he did then and does now, reside in Ohio; that he was then and is now an employe of appellee under the title of superintendent; that he is called superintendent because he has general supervision of the mechanical departments and processes,—the appellee being engaged in the manufacture of certain agriculturual implements, etc.; that when said summons was served, said Winchell was temporarily

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in Indianapolis, Indiana, but was not then or at any time during his temporary stay in Indiana engaged in the transaction of business for appellee, in any manner connected with the cause of action mentioned in the complaint.

The appellants demurred to the plea in abatement on the ground that it did not state facts sufficient to abate the action, which demurrer was overruled. Appellants elected to stand on the demurrer, and suffered judgment against them for costs. The ruling on the demurrer is the only error assigned. It is urged by appellee that the complaint does not state any cause of action against it, and hence if it was error to overrule the demurrer to its plea in abatement, such error is harmless. Such a rule does prevail in this State, but it is not applicable here, for the reason that as the record comes to us we can not determine the sufficiency of the complaint. The rule is firmly established in this State that the appellate tribunal will not consider any question on appeal that has not been presented to the lower court for its ruling. To this general rule there is an exception, and that is where issues have been made and the sufficiency of the complaint has not been tested by demurrer, the cause tried on its merits and judgment pronounced, then on appeal, by proper assignment of error, this court may pass upon the sufficiency of the complaint. After pleading to the merits of a cause, the sufficiency of the complaint is, until its final disposition, before the court; but where there has been no pleading to the merits of a cause, but only a plea in abatement which challenges the jurisdiction of the court as to the person of the defendant, the sufficiency of the complaint is not thereby presented to the court below, either directly or indirectly.

If the rule prevailed for which appellee contends, it

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would indeed be summary, and might in many instances work great hardships and harsh injustice. No difference how meritorious his right of action, if he had by oversight or otherwise, failed to state a cause of action, he would thus be deprived of the liberal and wholesome rule to answer, recognized in this State by the statute and the courts. Where a defendant has answered as to the merits of a cause, and his answer is attacked by a demurrer, such demurrer reaches the entire record, and may be carried back to the complaint, and the complaint declared insufficient, and the plaintiff, within such time as the court may prescribe, amend his complaint. But not so here. A demurrer to a plea in abatement does not reach the record, and can not be carried back and sustained to an insufficient complaint, and as there is no cross-error assigned here, calling in question the sufficiency of the complaint, we can not consider it. This exact question has been decided in this and in other states. A plea in abatement is not addressed to the complaint, and this is reason enough why a demurrer to it can not be carried back to the complaint. In 6, Enc. Plead. Prac., page 332. it is said: "A demurrer to a plea in abatement, or to an answer in abatement, as it is sometimes called, does not reach defects in a declaration." *Crawford v. Slade*, 9 Ala. 887; *Rogers v. Smileg*, 2 Porter (Ala.) 249; *Knott v. Clements*, 13 Ark. 335; *Wade v. Bridges*, 24 Ark. 569; *Vaden v. Ellis*, 18 Ark. 359; *State v. Hamlin*, 47 Conn. 118, *Ryan v. May*, 14 Ill. 49; *Price v. Grand Rapids, etc., R. R. Co.*, 18 Ind. 137; *Indiana, etc., R. W. Co. v. Foster*, 107 Ind. 430; *Anderson Building, etc., Ass'n v. Thompson*, 88 Ind. 405; *Clifford v. Cony*, 1 Mass. 500; *Dean v. Boyd*, 9 Dana (Ky) 171; *Shaw v. Dutcher*, 19 Wend. (N.Y.) 216; *Ellis v. Ellis*, 4 R. I. 110; *Myers v. Irwin*, 20 Ohio 381. In *Indiana, etc., R. W. Co. v. Foster*, *supra*, there was

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a plea to the jurisdiction of the court, to which a demurrer was filed and overruled. On appeal, appellant insisted that the complaint was not good, and asked the court to carry the demurrer to the plea in abatement back to the complaint. The court by Zollars, J., said: "The sufficiency of the complaint was not questioned below by demurrer, nor by motion to arrest the judgment; nor is its sufficiency questioned in this court, except by the assignment that the court below erred in not carrying the demurrer to the plea back, and sustaining it to the complaint. It is a sufficient answer to this assignment of error to say that demurrers to answers in abatement do not reach back to the complaint, because such answers are not addressed to the complaint." See, also, *Price v. Grand Rapids, etc., R. R. Co. supra*, and *Anderson Building, etc., Assn. v. Thompson, supra*.

We come now to the only question properly presented by the record, and that is the sufficiency of the plea in abatement. The real question is, does the plea in abatement state facts sufficient to show that the Marion Superior Court did not acquire jurisdiction over appellee? If it does, then the court correctly sustained the demurrer. A plea in abatement is a dilatory plea, and it is not regarded favorably by the courts. It must be definite and certain, and nothing can be supplied by intendment or construction. The plea must not only state facts necessary to the answer, but must also anticipate and exclude all such supposable matter as would, if alleged, on the opposite side, defeat his plea. In 1 Chitty Pl. 473 (16 Am. ed.), it is said: "As pleas in abatement do not deny and yet tend to delay the trial of the merits of the action, great accuracy and precision are required in framing them. They should be certain to every intent." In Stephen Pl. 35 (9 Am. ed.) it is said: Dilatory pleas are re-

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garded unfavorably by the courts as having the effect of excluding the truth, and therefore they "must be certain in every particular; which seems to amount to this, that they must meet and remove by anticipation every possible answer of the adversary." And at page 431, it is said: "The plea must, at the same time, correct the mistake, so as to enable the plaintiff to avoid the same objection, in framing his new suit or declaration."

Gould on Pl., in speaking of the certainty required in pleas in abatement, says: "Certainty of the third sort, or 'to a certain intent in every particular,' requires the utmost fullness and particularity of statement, as well as the highest attainable accuracy and precision, leaving, on the one hand, nothing to be supplied by intendment or construction; and on the other no supposable special answer unobviated. The rule requiring this degree of certainty, is a rule not of 'construction' only, but also of 'addition'; that is, it requires the pleader, not only to answer fully what is necessary to be answered; but also to anticipate and exclude all such supposable matter, as would, if alleged on the opposite side, defeat his plea." Gould on Pl. sec. 57. These elementary rules as to pleas in abatement have been adopted and carried into our jurisprudence by the courts. *Board, etc., v. LaFayette, &c., R. R. Co.*, 50 Ind. 85, 117; *Kelly v. State*, 53 Ind. 31; *Needham v. Wright*, 140 Ind. 190. It will be observed that in the plea in abatement, it is not denied that the cause of action did not arise in this State; neither does it deny that the appellee corporation has property within this State; nor is there any averment that it is not doing business in the State where jurisdiction was sought to be acquired, and lastly, it is not denied that the officer of appellee, upon whom service was had, was at the time within the State as the agent or rep-

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representative of appellee, and engaged in the transaction of business for it. It is averred that he was not here "engaged in the transaction of business for this defendant in any manner connected with the cause of action mentioned in the complaint." We must, under the well established rule, construe this pleading most strongly against the pleader, and in determining whether or not there was error in the ruling on the demurrer to the plea in abatement, we must assume that all these enumerated facts, so far as they may benefit the appellant, to be true. There are several statutory provisions regarding service upon persons and corporations, and primarily we must look to them as a guide in determining whether the service in this case, comes within their purview.

Section 313, Horner's R. S. 1897, is as follows: "Actions may be brought against a corporation created by or under the laws of any other state, government, or county, in any court having jurisdiction of the amount demanded, by any person having a cause of action, in any county within the State where any property, credits or effects belonging to or due to the corporation may be found." Section 313a, Horner's R. S. 1897, is as follows: "Any action against a corporation may be brought in any county, where the corporation has an office for the transaction of business, or any person resides upon whom process may be served against such corporation unless otherwise provided in this act." Section 316, Horner's R. S. 1897, provides for service of process upon domestic or foreign corporations, and among other things it is provided that "in case the defendant be a foreign corporation, having no such person, officer or agent, resident in the State, service may be made in the same manner as against other nonresidents."

The section just cited is lengthy, and we need not

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set it out in full. It designates three classes of persons upon whom process may be served: First, chief officers of the corporation; second, secondary officers; and third, any person authorized to do business for the corporation. *Toledo, etc., R. W. Co. v. Owen*, 43 Ind. 405.

It seems to us that in determining the question we are now considering, the several statutory provisions we have above quoted should be construed together. Section 313a, *supra*, was a part of the civil code of 1852, being section 796, code of 1852, but was omitted in the revision of 1881. In the subsequent revisions, however, it has been carried forward, but in *Globe Accident Ins. Co. v. Reid*, 19 Ind. App. 203, this court held that it was repealed by the act of 1881, overruling the case of *Evansville, etc., R. R. Co. v. Spellbring*, 1 Ind. App. 67, holding to the contrary. Thus we are left to consider sections 313 and 316, *supra*.

Under section 313, *supra*, actions against a foreign corporation may be brought "in any court having jurisdiction of the amount demanded, * * * in any county within the State, where any property, moneys, credits or effects belonging or due to the corporation may be found." There is no pretense but what the Marion Superior Court had jurisdiction of the amount demanded, and as there is no showing to the contrary by the plea in abatement, that the appellee corporation did not have any property, moneys, credits or effects, etc., and if necessary we might assume under the strict rules of construction applicable to pleas of this character, that it did have such property, etc., and hence it was subject to be sued in such county. To properly bring appellee into court, summons had to be served upon some one, who was connected with it in an official capacity. One of such persons was its superintendent, and summons was served upon him, and the return shows that he was the highest officer of ap-

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pellee corporation, within the bailiwick of the officers making the service.

Turning now to section 316, *supra*, we find that process can be served upon either a domestic or foreign corporation on certain of its officers, etc. If none of the officers enumerated in this section can be found, then service can be made upon any person authorized to transact business in the name of such corporation. Again, it is provided that "in case the defendant be a foreign corporation, having no such person, officer or agent, resident in the State, service may be made in the same manner as against other nonresidents." It cannot be denied, and especially it is not denied in appellee's plea in abatement, that a general superintendent of a corporation is an officer of such corporation, and authorized to transact business in its name.

As we have before said, we must assume from the plea itself that Winchell was authorized to transact business for his corporation, and that he was in this jurisdiction for that purpose. So that we find that in the case before us, the service upon Winchell comes within both the spirit and letter of the statute, providing that service may be had upon certain officers of a corporation and any one authorized to transact business for it. Then by the latter clause of the section, where a defendant is a foreign corporation, and there is no such officer, etc., resident of the State, "service may be made in the same manner as against other nonresidents." Alderson on Judicial Writs and Process, p. 202, says: "Under the common law, jurisdiction could not be acquired over a foreign corporation by the service of process on one of its officers. . But under statute a foreign corporation may be subjected to the jurisdiction of the courts of a state by personal service on the proper officer, and such service is equivalent to a personal service on a nonresident natural

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person. No attachment of property is necessary." This doctrine seems to rest on sound principle, and is sustained by the authorities. *Barnett v. Chicago, etc., R. R. Co.*, 4 Hun (N. Y.) 114; *Weymouth v. Washington, etc., R. R. Co.*, 1 MacArthur 19. The case last cited is a very pointed one. There appellee corporation was created by an act of the Virginia legislature, and by an act of congress was allowed to run its road into the District of Columbia. It borrowed a sum of money in New York, through the agency of its treasurer, and default in payment having been made, suit was commenced in the supreme court of New York, by service of process upon its secretary, who was found there, and judgment rendered for the amount due. An action was commenced in the supreme court of the District of Columbia upon a transcript of the judgment procured in New York. It was held that the corporation having contracted the debt in New York, the court there obtained complete jurisdiction, by such service, and that the judgment there obtained was entitled to the same conclusiveness in the District of Columbia as in the state where it was rendered. Again, at page 202, the same author says: "Corporations are artificial persons, existing only in contemplation of law. They must dwell in the place of their creation, and cannot migrate to another state. But they may be sued like natural persons, in transitory actions arising *ex contractu*, or *ex delicto*, in any state where legal service of process may be had." And so in Mississippi it has been held. *New Orleans, etc., R. R. Co. v. Wallace*, 50 Miss. 244.

In Illinois it has been held that if the act authorizing service of process upon corporations applied to foreign corporations at all, it did not authorize the service of process issued in favor of a nonresident on an officer of a foreign corporation, if he came into the

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state as an individual only. This rule is eminently correct, for as above said, a corporation cannot migrate to another state, and if one of its officers goes into another state merely as an individual, while there he has no official connection with or is no part of such corporation. But in the same case it was held that the rule is different where such foreign corporation does business in another state, has property there, and an officer or an agent charged with such business. In such case the corporation may be sued in a state other than in the state where it is created and has its legal existence.

Midland Pacific R. W. Co. v. McDermid, 91 Ill. 170. Where an officer or an agent of a corporation is in another jurisdiction, representing such corporation and transacting business therein, it thereby submits itself to the jurisdiction of the courts, may be sued therein and service had upon such officer or agent. *Midland Pacific R. R. Co. v. McDermid*, *supra*; *Porter v. Sewall Car-Heating Co.*, 7 N. Y. Supp. 166; *Silsbee v. Quincy Hotel Co.*, 30 Ill. App. 204. Alderson on Judicial Writs and Process, at page 201, says: "A corporation doing business in a state other than where it was incorporated becomes subject to the jurisdiction of the courts of the former state, and process against it may be served on its officer or agent." *City Fire Ins. Co. v. Carrugi*, 41 Ga. 660; *Western Union Tel. Co. v. Pleasants*, 46 Ala. 641.

In *Globe Accident Ins. Co. v. Reid*, *supra*, on a petition for rehearing, this court by Black, J., said: "A corporation organized under the laws of one state, and doing business in another state, becomes liable to be sued and served in the latter state, not merely where the action relates to business done therein, but also in transitory actions arising in another state. A corporation is not regarded as a citizen of a state

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within the meaning of the constitutional provision that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states; and a state may impose conditions, not in conflict with the laws and constitution of the United States, on the transaction of business within its territory by corporations chartered elsewhere, or may exclude them, or revoke permission or license already given. A corporation chartered in one state by doing business in another state, where, as a condition expressed or implied to its right to do business there, it must submit to be sued in the courts of such other state, waives the right to be sued in the place of its residence, the right of trial within the state, district or county of one's residence being a privilege which may be waived. It is not necessary that such a condition to the right of doing business be expressly stated in the statute, though this is sometimes done. If there be a statutory provision for service of summons upon a foreign corporation by serving its officers or agents through which it is doing its business in the state where the transitory action is brought, then there is an implied condition that the corporation, while operating in such state, shall submit to the jurisdiction of its courts upon such service; and while it so does business by such officers or agents it waives thereby objection to jurisdiction in *personam* acquired by service on them. In such case, though the corporation resides in the state of its creation, it is 'found' in the state where it is so sued and served. See *United States v. American Bell Tel. Co.*, 29 Fed. 17; *Works, Courts and Jurisdiction* 43; *Elliott, on Railroads* 621; *Thomp. Corp.* 8019 *et seq.*" A corporation is an artificial person. As was said in *Davis v. Steuben School Tp.*, 19 Ind. App. 694. "It exists only by virtue of statute. It is an impersonal something. It is without knowledge.

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action or existence save in law. It can only act by and through its legal officer and representative." And as was said in *Globe Accident Ins. Co. v. Reid*, *supra*: "The legal situs of a corporation, its residence, for purposes of jurisdiction need not be so confined, however, but may by statutory provision be in any place where its franchises are exercised or business is done, or wherever it has an agent on whom process may be served. A corporation is necessarily represented by its officers and agents. A law which authorizes suit to be brought against a corporation in any county in which it transacts business through its agents has been said to be based upon sound reasons growing out of the difference between natural and artificial persons. *Home Protection, etc., v. Richards*, 74 Ala. 466; *Mobile Life Ins. Co. v. Pruett*, 74 Ala. 487."

The statute in this State provides for service of process, both upon domestic and foreign corporations, and also where actions against them may be commenced. It was certainly not the intention of the legislature to confer greater privileges upon foreign than upon domestic corporations. The former are permitted to do business in this State, and it is an equitable rule that they should submit themselves to the jurisdiction of our courts in return for the reciprocal right to transact business within our borders. It is the general rule, recognized everywhere, that a natural person shall only be sued in the immediate county, or local jurisdiction of his citizenship, and this rule is applicable alike to every citizen. Yet if a citizen of Ohio comes into our State, he may be sued in any county where found, and upon personal service of summons upon him, a judgment in *personam* may be rendered against him. Sec. 312 Horner's R. S. 1897; *Reed v. Browning*, 130 Ind. 575.

Why is not this rule as applicable to foreign artifi-

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cial persons as to foreign natural persons, and what good reason is there why the rule should not be strictly enforced? We are unable to see any, and especially is this true in the view of the broad and liberal statutory provisions we have quoted. When Winchell, appellee's superintendent, was within the jurisdiction of the lower court, engaged in the transaction of its business, appellee itself was there, for as we have seen, a corporation can only act by and through its officers and authorized agents.

A foreign corporation is protected in all of its rights by the laws of this State, when it complies with such laws. It may transact business here; it may seek the forum of our courts to enforce its rights and collect debts due it, and it is sound reason that it should be held responsible in the same tribunals which it uses for its own benefit for obligations and liabilities here incurred. In other words if it comes within our jurisdiction to transact business for its own profit and benefit, it must in like manner respond in our courts to demands against it, accruing to our citizens arising out of its business here contracted. And we believe this to be the prevailing doctrine. In *National Condensed Milk Co. v. Brandenburgh*, 40 N. J. L. 111, it was said: "Since the case of *Moulin v. Ins. Co.*, 4 Zab. 222, and 1 Dutcher 57, it must be regarded as the settled law of this court, that if a corporation makes a contract in a state other than that in which it was chartered, it thereby submits itself to the jurisdiction of such foreign sovereignty so far as to be liable to suit therein in regard to that contract, when summoned according to the laws of the state." Mr. Justice Drummond, of the United States Circuit Court, in *Wilson Packing Co. v. Hunter*, vol. 11 Chicago Legal News, and also reported in 8 Central Law Journal, 333, 7 Reporter 455, said: "Now, in the case of Harris, reported

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in 12 Wallace, the only ground upon which the court took jurisdiction of the case was under the acts of Congress. The Baltimore and Ohio Railroad was authorized to construct a railroad within the District of Columbia, the service of process was upon the president of the company, he was found within the district; the person, the corporation, was there through its president, and it was the only way that the court could by any possibility take jurisdiction. The person, the defendant, the corporation, must be found within the district in order that the court may have jurisdiction, and it was found there in consequence of the acts of Congress which authorized it to construct a branch road within the district, and because the president was within the district. At the time the writ was thus served there was no act of Congress authorizing suits against corporations doing business in the district, and of course no act which authorized service of process upon foreign corporations, though the court took jurisdiction of the case as I have said on the ground that the corporation was there found." * * *

Continuing the learned judge, speaking about foreign corporations doing business in states other than those where they are chartered, said: "When they attempt to do business within the state, they come within the limits of our state, they are protected by our laws when they transact business within our territory, and are they then not to be subject to suits against them? Ought they to be permitted to come here, to make contracts, to do may be all their business here by virtue of the law of another state, and then say they cannot be sued in our state because their corporation is within another, a sister state? I do not think that it is reasonable or right. They come, they ask the protection of our laws. They transact business

under the protection of those laws, and they ought to be liable to the burdens as well as the benefits of the laws. One of the burdens, I think, is liability to be sued." This is strong and pointed language, and is entitled to great weight, and serious consideration.

Remembering that the case cited from 12 Wallace and the case from which we have just quoted, the jurisdiction was sustained in the absence of statutory enactment providing for service of process upon foreign corporations, how much more forcible the rule where such provision is made by statute, as in this State. In 22 Am. and Eng. Enc. Law, p. 118, speaking of statutes relating to service of process on corporations, it is said: "It has been decided that since the object of such statutes is merely to carry out the principle that no proceeding may be had against the defendant until due notice has been given him, a service which virtually accomplishes this object will not be held invalid, if the statute is capable of a double construction." *St. Louis, etc., R. W. Co. v. Yocum*, 34 Ark. 493; *Ghiradelli v. Greene*, 56 Col. 629; *Cicero Tp. v. Shirk*, 122 Ind. 572; *Nye v. Burlington, etc., R. R. Co.*, 60 Vt. 585, 11 Atl. 689; *Pope v. Terre Haute, etc., Mfg. Co.*, 87 N. Y. 137. It has also been held that such statutes, being of a remedial nature, are to receive a liberal construction. *Pcoriu Ins. Co. v. Warner*, 28 Ill. 429; *Pope v. Terre Haute, etc., Mfg. Co.*, *supra*; *Cincinnati, etc., R. R. Co. v. McDougall*, 108 Ind. 179.

So far as we have been able to investigate, we do not find any state having statutory provisions identical to ours, in regard to service upon corporations. This being the case, there is no case in other states construing like provisions. We do not find, however, any state with broader or more liberal provisions than our own. But touching the modern tendency toward

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extending jurisdiction, and the liberal manner in which courts construe statutes relating to jurisdiction, we cite the *Galveston City R. R. Co. v. Hook*, 40 Ill. App. 547, in which it is said: "To be found within the State, a foreign corporation must have sent its agent, on whom service is made, to the State to conduct its business therein, either continuously or for a time, so as to complete a transaction or an enterprise, or at least charged with the duty of making a particular contract in the State, or negotiating therein for the company." *Klopp v. Water Works Co.*, 34 Neb. 808, 52 N. W. 819, is a case directly in point. There appellee was a corporation organized and acting under the laws of Iowa. Action was commenced against it in Douglas county, Nebraska, and summons was served on one Soper, vice president, while temporarily in that county. The appellee appeared specially and filed a plea to the jurisdiction of the court, in which plea it was averred: First, that it was a foreign corporation; second, that it had no office of any kind nor any property, nor any managing or other agent in the state of Nebraska at the time of the institution of the action, nor had not since; third, that the said Soper, upon whom process was served, was at the time and ever since, has been and now is, a resident of the state of Illinois, and a nonresident of the state of Nebraska, and was but temporarily in and passing through the county of Douglas, when such service was had upon him.

After quoting the statute which authorizes service of process upon certain officers of a foreign corporation, the court said: "Now, suppose a foreign corporation comes into this State and purchases goods to be paid for here, must the seller go into another state or perhaps to a foreign country to recover for the same? This is true if service cannot be had upon the

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corporation in the State, then the seller must bring his action where service can be had. But a person who has authority to contract a debt for the corporation within the state, is so far the managing agent within the state, that service may be had upon him for that debt, that will bind the corporation. The agent is commissioned to contract the debt, and the corporation thereby secures the benefit of his services. It must also take the burden of being liable to an action therefor. It will be observed that neither the motion nor the affidavit negative the fact that the debt was contracted here, or that Soper was the managing agent in this state." The plea was held bad. It will be observed that the plea in the case just cited is much stronger than in the case before us, in that it contained an express denial that the appellee had property or was doing business in the state. See, also, *Porter v. Chicago, etc., R. W. Co.*, 1 Neb. 14; *Chicago, etc., R. R. Co. v. Manning*, 23 Neb. 552, 37 N. W. 462; *Iron Co. v. Construction Co.*, 61 Mich. 226, 28 N. W. 77; *Cunningham v. Southern Express Co.*, 67 N. C. 425; *Hester v. Fertilizer Co.*, 33 S. C. 610, 2 S. E. 563; *Merchants' Mfg. Co. v. Grand Trunk R. W. Co.*, 63 Howard, Pr. 459; *Porter v. Car Heating Co.*, 7 N. Y. Supp. 166; *Hiller v. Burlington, etc., R. R. Co.*, 70 N. Y. 223; *Pope v. Terre Haute, etc., Mfg. Co.*, *supra*.

Judge Baker, of the United States Court for the district of Indiana, has recently passed upon the question we are now considering, in the case of *Scofield v. Peter Scheenhoffer Brewing Co.* The case is not reported, but the facts are substantially as follows: Scofield sued the Brewing Company in the Elkhart Circuit Court, to recover for alleged personal injuries. Summons was served upon one Howe, as the agent of

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the company, and the return showed that there was no officer of the company superior in rank found, upon whom service could be had. The case was removed to the Federal Court where a motion was made to quash and set aside the summons and the sheriff's return. The brewing company was a foreign corporation; did not have any office or place of business for the transaction of business in Indiana; that it did not transact business in said State except as it received orders by mail, or obtained orders in said State by and through its traveling salesmen, who went from Chicago, Illinois, where said company was organized and had its office; that said company did not and never had any agents residing in this State; that the only agents it ever had in this State were traveling salesmen temporarily going from place to place, whose sole authority was to solicit and procure orders for the products of the said company; that said Howe was such salesman, and that he had his residence in Chicago, and his sole authority was as just stated; that when said summons was served on him, he was at Elkhart, Indiana, temporarily, for the sole purpose of soliciting and procuring orders for said company. Upon these facts, which were found specially, the court stated its conclusions of law, that the service of summons so made on said Howe was sufficient to give the Elkhart Circuit Court jurisdiction over said company.

This is the strongest case we have found, and while, in our judgment, the rule announced is carried to the very border line and extreme limits, it is entitled to much weight, coming as it does from one so profoundly learned in the law, and one who has had such a long experience, both as a lawyer and a judge. We do not feel like closing this opinion without remarking that there are some courts of high standing, that have not carried the rule so far as expressed herein, and

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others which have held to the contrary; but after a deliberate consideration and exhaustive review of all the authorities, the conclusion we have reached is in harmony with the great weight of the decided cases, and is correct upon sound principle. The judgment is reversed, with instructions to the court below to sustain the demurrer to appellee's plea in abatement, and for further proceedings not inconsistent with this opinion.

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[No. 2,512. Filed June 30, 1898.]

PLEADING.—Counterclaim.—A counterclaim filed by defendant in an action on a promissory note given for the purchase-money of machinery bought of plaintiff which alleges that the machinery did not do the work which it was warranted to do, and that defendant expended large sums of money in repairing same, is not bad for failing to aver that the machinery was worthless. *pp. 535, 536.*

INSTRUCTIONS.—Sales.—Principal and Agent.—The court erred in instructing the jury in an action on a promissory note given for the purchase-price of certain machinery, that if the jury found that plaintiffs sold defendant the machinery in question that plaintiffs were estopped from denying that they were the owners of the machinery at the time of the sale, and that the jury should disregard any evidence tending to show that plaintiffs were not the owners thereof, where the theory of plaintiffs was that the machinery was the property of their principal, and that they sold same as agents of their principal. *pp. 537-540.*

ACTION.—Theory.—Parties are bound by the theory upon which they try their case, and must recover upon that theory or not at all. *p. 539.*

CONTRACTS.—Written Contract.—Oral Negotiations.—Where a written contract is made covering the subject-matter involved, all oral negotiations leading up to it are merged in the written contract. *p. 541.*

BILLS AND NOTES.—Estoppel.—A provision in a promissory note given in payment of machinery purchased, that the title to the property shall remain in the payees until the note is paid, will not preclude payees from showing, in an action on the note, that they were not the owners of the property. *p. 542.*

From the Montgomery Circuit Court. *Reversed.*

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M. W. Bruner, for appellants.

Paul & Van Cleave, Wright & Seller and W. P. Britton, for appellee.

WILEY, J.—Appellants were plaintiffs below, and sued appellee upon two promissory notes and a balance alleged to be due upon an account. The complaint was in three paragraphs; the first and second based upon the notes and the third upon the account. The two notes sued on were given as part payment of a Keystone corn husker and fodder shredder, and each contained the following provision: "I further agree that the title to the No. 826 Corn Husker and Shredder, for which this note is given, shall remain in said Tinsley & Martin's hands until this note is fully paid, unless the payees elect to make this note absolute."

Appellee answered in two paragraphs and filed a counterclaim in two paragraphs. The first paragraph of answer was a plea of payment. The second paragraph went to the first and second paragraphs of complaint. This paragraph admits the execution of the notes, and avers that before suit was brought, and without having been notified that appellants had elected to make said notes absolute, appellee tendered back to appellants said machine and demanded the surrender of the notes sued on; that they declined to accept the same and surrender the notes; that appellee cannot bring said machine into court on account of its great size and weight, and concludes with an offer to deliver it to appellants.

The first paragraph of the counterclaim averred the purchase of the machine by the appellee from appellants; that appellants warranted the machine to do the work for which it was intended, and that it so failed to do the work. This paragraph of counterclaim then avers certain facts in regard to what appellee did to make the machine work; that he ex-

pended large sums of money in repairs, labor, etc., and asks for judgment on account thereof. The theory of this paragraph is that appellants gave an express parol warranty of the machine and that said warranty failed. The second paragraph of counterclaim is like the first, except it counts upon an implied warranty.

Appellants addressed a demurrer to the second paragraph of answer and the two paragraphs of counterclaim, which demurrers were overruled. Appellants replied to the second paragraph of answer and answered the first and second paragraphs of counterclaim by general denial. Trial by jury, a general verdict for appellants on the account, and for appellee on the notes. Over appellants' motion for a new trial judgment was rendered on the verdict. Overruling the motion for a new trial, and the demurrers to the first and second paragraphs of counterclaim are the only errors assigned which counsel for appellants have discussed.

It is urged that neither paragraph of the counterclaim is good, because it is not averred that the machine purchased was worthless. If the same facts as stated in the counterclaim had been pleaded in an answer, appellants' objections would have been well taken, but a counterclaim does not fulfil the office of an answer. While any matter pleaded as a counterclaim must arise out of or be connected with the transaction set forth as a cause of action in the complaint, yet such facts must be sufficient to constitute an original cause of action against the plaintiff, or the pleading will be bad on demurrer, although the facts set forth might have been a good defense if pleaded by way of answer. *Brower v. Nellis*, 6 Ind. App. 323; *Miller v. Roberts*, 106 Ind. 63; *Mills v. Rosenbaum*, 103 Ind. 152; *Standley v. Northwestern, etc., Ins. Co.*, 95 Ind. 254; *Jones v. Hathaway*, 77 Ind. 14.

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A counterclaim to be sufficient, must contain all the essential averments of a complaint, and must state a cause of action in favor of the defendant and against the plaintiff, growing out of the subject-matter alleged in the complaint. *Wabash Valley Protective Union v. James*, 8 Ind. App. 449. We think the pleading we are now considering, is sufficient, under the authorities cited.

The only remaining error assigned, which appellants have discussed, is the overruling of their motion for a new trial. There were eight reasons assigned for a new trial. The fifth cause was the giving of certain instructions tendered by the appellee. The first instruction, which appellants most earnestly contend was erroneous, is as follows: "Gentlemen of the jury, I instruct you that if you find from the evidence in this case that on or about the 15th day of November, 1893, the plaintiffs * * * were a firm doing business under the firm name of Tinsley & Martin, and if you find that said firm * * * sold and delivered to the defendant * * * the corn husker and shredder in controversy, * * * and that Michael Fruits executed two other notes of \$100.00 each, at the same time, and like the notes set forth in plaintiffs' complaint, and that the plaintiffs have received payment from Michael Fruits for two of said notes and \$25.00 on one of the others, then I instruct you that the plaintiffs are estopped from denying that they sold said corn husker and shredder to Michael Fruits, and they are also estopped from saying that they were not the owners of said corn husker and shredder at the time of such sale, and if you find such facts to be true then I instruct you that you should disregard any evidence that has been introduced before you, tending to prove that said Tinsley & Martin were not the owners of said corn husker and shredder at the time of such

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sale, or tending to prove that said Tinsley & Martin did not make said sale." To apply this instruction to the facts to which it is addressed, and to understand correctly its full force and effect, it is necessary to state in brief what the record shows.

It is the theory of appellants, that the machine mentioned in the pleadings was sold by them to appellee, as agents of the Keystone Manufacturing Company, and that the contract of sale was in writing, and that such contract was the sole and only contract made.

It is the theory of appellee, as disclosed by his counterclaim, that he purchased the machine direct from appellants upon their warranty, and that said warranty was in parol, and there had been a breach, etc. The only evidence on the question of sale and purchase, as disclosed by the record, was the testimony of the appellants and the appellee, and a written order signed by appellee, which appellants introduced in evidence.

The controlling issue in the case was, who made the sale of the machine to appellee? The contention of appellants is that the sale was made by the Keystone Manufacturing Company on a written order from appellee, which was negotiated and procured by and through appellants as agents. If this was true, then appellee could not recover on his counterclaim against appellants. If we concede that the sale was made to appellee as just indicated, then, under the facts stated in the counterclaim, appellee could not recover, for the counterclaim proceeds upon the theory of the contract of purchase and sale having been made between appellants and appellee, and the express and implied warranty relied upon, is based upon such sale.

We fully recognize the rule that where an agent acts for his principal and negotiates a sale under a

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written or verbal contract containing a warranty, the agent may also be bound by an independent contract of warranty, but that is not this case. Parties are bound by the theory upon which they try their case, and must recover upon that theory or not at all. Appellee does not claim that he purchased the machine of the Keystone Manufacturing Company through appellants as agents, and that in addition to the warranty expressed in the contract, appellants made with him an independent express warranty, upon which they would be liable; but he rests his right of recovery upon a sale made directly to him by appellants, and their accompanying parol implied an express warranty.

While the instruction is ingeniously drawn, it is not a correct exposition of the law applicable to the facts. A proper interpretation of it is a direction to the jury to disregard any evidence tending to prove that appellants were not the owners of the machine sold. The only way possible for the jury to determine that appellants sold the machine, and were the owners of it at the time, was to disregard all the evidence tending to prove that they were not the owners. What was the evidence? Appellants both testified that they were the agents of the Keystone Manufacturing Company; that as such they negotiated the sale to appellee; that the contract or order of sale was in writing, and that they did not own the machine when sold. Appellee admitted that he executed a written order for the machine and that order was introduced and read in evidence. The order begins as follows: "Order for Keystone Combined Corn Husker and Fodder Cutter." This order is dated at Crawfordsville, November 5, 1893, and is addressed to "Keystone Mfg. Co., Sterling, Ill." The formal order is as follows: "Gentlemen: Please deliver on cars at Sterling, to

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be shipped to me at Crawfordsville, in care of Tinsley & Martin, one No. 1 Keystone Corn Husker and Fodder Shredder, etc." The order contains an express warranty, and provides that the purchaser shall give notice in two days, if warranty fails. The order contains the following clause: "In consideration whereof the undersigned agrees to receive same on arrival, to pay freight and charges, and on delivery at depot, to pay to your agents Tinsley & Martin, etc." This order is signed by appellee, and on the back of it is a property statement signed by him.

The evidence shows that the machine was shipped direct from the factory to appellee in care of appellants. He was notified of its arrival, and he went to Crawfordsville and got it. In his examination appellee admits that he did not make a contract for the machine when appellant Martin first talked about it, and fails to say that he ever made such a contract with appellants.

On cross-examination appellee testified that Martin told him he was selling the machine for the Keystone Manufacturing Company. He then said: "I bought it of Mr. Martin. I done what talking about buying to Mr. Martin." When shown the written order, he acknowledged that he gave the order, and that it was his signature. The only evidence in the entire record, upon which it was possible for the jury to determine as a fact, that the machine was the property of Tinsley & Martin was the statement of appellee: "I bought it of Mr. Martin. I done what talking about buying to Mr. Martin." In view of all the facts in regard to the purchase and the sale, this language could have but one meaning, and that was that the negotiations between appellants and appellee, leading to the purchase of the machine by the latter, were had between Martin and appellee, and that the meaning

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of the expression, "I bought it of Mr. Martin. I done what talking about buying to Mr. Martin," was that all oral negotiations leading up to the contract, were between them. We can readily see how a jury might be misled by the expression used by appellee, and especially is this true in view of the language used in the instruction. Where a written contract is made covering the subject-matter involved, it is the rule everywhere, that all oral negotiations leading up to it are merged therein, and this question is not covered by any of the instructions. The instruction under consideration tells the jury that if they find that appellants sold and delivered to appellee the machine described, they are estopped from saying that they did not sell it, or that they were not the owners of it; and if they did so find, they should disregard any evidence tending to prove that they were not the owners, etc.

In this instruction the court omitted to state an essential element, and that was to explain to the jury that if they found that appellants made the sale as agents for the Keystone Manufacturing Company, they could not regard that as a sale made by them as of their own property. The court failed to explain to the jury in any of the instructions, the distinction between appellants' selling the machine as agents of the Keystone Manufacturing Company and selling it as and for themselves. The appellee having testified that he bought the machine of appellants, under this instruction, the jury were evidently misled, that whether they made it agents or principals, it would make no difference. The mere fact of the sale having been made by them, whether as agents or principals, under the instruction, excluded from the consideration of the jury all the evidence on behalf of appellants as to the facts under which they sold the machine. Another objection to the instruction is that

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it seeks to invoke the principle of estoppel as against the appellants. The theory of the instruction is that, because there is a provision in the notes that the title to the property shall remain in the payees, etc., they are estopped to deny that they were not the owners when it was sold.

We cannot think that such a clause in the notes precludes appellants from showing they were not the owners of the property. It is a mere inference, and there can be no estoppel by inference. *Lash v. Rendell*, 72 Ind. 475; *Robbins v. Magee*, 76 Ind. 381. It is subject to the further objection that it applies the principle of estoppel where there is no fraud charged, where no one has been deceived or misled to his injury. It has been repeatedly held that there can be no estoppel without fraud. *Anderson v. Hubble*, 93 Ind. 570, 47 Am. Rep. 394; *Pitcher v. Dove*, 99 Ind. 175; *Ward v. Berkshire, etc., Ins. Co.*, 108 Ind. 301; *Kelley v. Fisk*, 110 Ind. 552; *Wisehart v. Hedrick*, 118 Ind. 341; *Maxon v. Lane*, 124 Ind. 592; *Albrecht v. Foster, etc., Co.*, 126 Ind. 318.

It is also a settled principle that the doctrine of estoppel can have no application where everything in relation to the transaction is equally well known to both parties. *Lash v. Rendell, supra*; *Fletcher v. Holmes*, 25 Ind. 458. Here there is no pretense that appellants concealed or attempted to conceal any facts from appellee in regard to the sale. Appellee gave a written order for the machine direct to the manufacturer. He was notified, and so admitted, that Martin told him they were selling it as the agents of the manufacturer. Hence the rule just announced applies and there could be no estoppel.

As the judgment must be reversed for the error in giving this instruction, the other questions presented by the motion for a new trial need not be decided, as

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they are not likely to arise in a subsequent trial. Judgment reversed, with instructions to the court below to sustain appellants' motion for a new trial.

CLARK SCHOOL TOWNSHIP v. HOME INSURANCE
AND TRUST COMPANY.

[No. 2,527. Filed June 30, 1898.]

TOWNSHIP TRUSTEE.—*Contracting Debts Contrary to Law.*—Where a township trustee contracts a debt contrary to the provisions of sections 8081, 8082, Burns' R. S. 1894, and anything for which the trustee has the authority to expend money from the special school fund has, under the contract, been received and retained by the school township which is beneficial to such township, there may be a recovery against the township for the benefit so derived by it. pp. 545, 546.

SAME.—*Insurance of School Property.*—Under the provision of section 5920, Burns' R. S. 1894, placing upon a township trustee the duty of caring for and managing the school property belonging to the township, he has such implied authority, that in the exercise of his discretion, he may make reasonable expenditures from the special school revenue in procuring insurance on such property against fire. pp. 546, 547.

From the Perry Circuit Court. *Affirmed.*

Sol. H. Esarey, for appellant.

Elbert M. Swan, for appellee.

BLACK, J.—Appellee brought its action against appellant, Clark school township, of Perry county, Indiana, to recover the price of a policy insuring the school township for three years against loss by fire on twenty schoolhouses and school furniture, fixtures and apparatus therein, in said township, under the control, care and management of the trustee of said school township.

There were two paragraphs of complaint, the first, to recover the price at which the policy was issued, which was alleged to be its value; the second, setting forth a warrant for said price, certified therein to be

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due from Clark township, payable out of the special school fund, for insurance on twenty schoolhouses, to an agent, named, of the appellee, which warrant was assigned by indorsement in writing by said agent to the appellee. In each paragraph it was alleged that the appellant, by and through its trustee applied for the insurance to said agent; that thereupon the appellee issued the policy to the appellant, and delivered it to said trustee for the appellant; that since the policy was so issued it had been, and still was, a valid and subsisting insurance on said property of the appellant; that said insurance was useful, suitable and necessary for the benefit of the appellant, and was of the value stated as the price thereof; that it was delivered by the appellee to the appellant and accepted by the latter, which had ever since received and retained the benefit thereof.

There was an answer in two paragraphs, the first being the general denial. A demurrer to the second paragraph of answer was sustained, and this ruling alone is assigned as error. In this paragraph it was alleged, that at the time appellant incurred, or attempted to incur said debt, "the fund to which the same was chargeable was in debt in excess of the funds on hands and of the current year's levy, and that the defendant's trustee did not post the notices in the said township that he would ask the board of commissioners of Perry county, Indiana, for permission to incur said debt, nor did he ask the permission of the commissioners of said county, at any time, or for any purpose, to grant to said trustee any such privilege; but that he contracted said debt or pretended debt in express violation of the law of the State of Indiana." The appellant by this answer sought to base its defense upon the statute by which it is provided, that "whenever it becomes necessary

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for the trustee of any township in this State to incur, on behalf of his township, any debt or debts whose aggregate amount shall be in excess of the fund on hand to which such debt or debts are chargeable, and of the fund to be derived from the tax assessed against his township for the year in which such debt is to be incurred, such trustee shall first procure an order from the board of county commissioners of the county in which such township is situated, authorizing him to contract such indebtedness;" and "before the board of commissioners shall grant such order, the township trustee shall file, in the auditor's office of his county, a petition, setting forth therein the object for which such debt or debts are to be incurred and the approximate amount required, and shall make affidavit that he has caused notice to be given of the pendency of such petition, by posting notices, in not less than five public places in his township, at least twenty days prior to the first day of the session of said board." Sections 8081, 8082, Burns' R. S. 1894 (6006, 6007, Horner's R. S. 1897).

It has been settled that a township trustee has no power to bind his township by a contract in violation of these statutory provisions; but that when a trustee of a school township undertakes to bind the township by contracting a debt contrary to these provisions, and anything for which the trustee has authority to expend money from the special school fund has under his contract been received and retained by the school township which is beneficial to such township, there may be a recovery against the school township for the benefit so derived by it, the right to recover resting, not upon the contract, but upon the fact that the school township received and enjoyed the benefit of something suitable and necessary, which the trustee

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would have had authority of law, as such, to procure for the benefit of the school township, with money of its special school fund in his hands, without contracting a debt therefor. See *Boyd v. Black School Tp.*, 123 Ind. 1; *Boyd v. Mill Creek School Tp.*, 124 Ind. 193; *Killian v. State, ex rel.*, 15 Ind. App. 261; *Clinton School Tp. v. Lebanon Nat'l Bank*, 18 Ind. App. 42; *Helms v. State, ex rel.*, 19 Ind. App. 360; *Clark School Tp. v. Grossius, ante* 322.

We need not determine whether a violation of the statutory restriction was sufficiently stated in the answer, if the complaint showed a good cause of action. The demurrer searched the complaint, and a bad answer would be good enough for a bad complaint.

If the trustee of the school township had authority to expend money from the special school fund for insurance, it must be expressed or implied in the statutes; for he is a special public agent, with restricted statutory authority. It is provided that the trustees of the several townships, etc., shall have power to levy a special tax in their respective townships, etc., "for the construction, renting or repairing of school-houses, for providing furniture, school apparatus and fuel therefor, and for the payment of other necessary expenses of the school, except tuition," etc., and that the income from said tax shall be denominated the special school revenue. Section 5953, Burns' R. S. 1894 (4467, Horner's R. S. 1897).

It is also provided, that the trustees shall take charge of the educational affairs of their respective townships, etc., and build or otherwise provide suitable houses, furniture, apparatus and other articles of educational appliances necessary for the thorough organization and efficient management of said schools, and that they "shall have the care and management

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of all property, real and personal, belonging to their respective corporations for common school purposes, except the congressional school lands," etc. Section 5920, Burns' R. S. 1894 (4444, Horner's R. S. 1897). If the trustee has authority to purchase insurance against loss by fire, it is derived, we apprehend, under these statutes. In *Jackson Township v. Home Ins. Co.*, 54 Ind. 184, it was held that the trustee of a township could not render the civil township liable in an action against it by his contract which purported to be his promise as trustee of the township to pay for insurance on schoolhouses of the township, the action not being against the school township and the contract not purporting to be made by or on behalf of the school township. It was said that the township had no power to make a contract for the building of a schoolhouse, and that if it had not such power, it required no argument to show that it had no power unless specially conferred, to insure a schoolhouse. The case did not require a decision upon the question whether a school township might so contract through its trustee.

We are of the opinion that, under the statutory provisions placing upon the trustee the duty of caring for and managing the school property, he has such implied authority, that, in the exercise of his discretion, he may make reasonable expenditures from the special school revenue by way of procuring insurance on such property against fire. The judgment is affirmed.

ST. LOUIS, INDIANAPOLIS AND EASTERN RAILROAD
COMPANY v. RIDGE, ADMINISTRATRIX.

[No. 2,248. Filed March 8, 1898. Rehearing denied June 30, 1898.]

RAILROADS.—*Personal Injuries.*—*Negligence.*—Plaintiff's intestate, while in the employ of a street contractor in loading gravel upon a

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wagon near defendant's railroad track where it had been deposited by defendant for such contractor, was struck by defendant's locomotive and cars which had ran off the track, and was fatally injured. The jury found that the locomotive was thrown from the track by reason of the accumulation of gravel thereon from unloading cars. It was also found that intestate was a farmer and had never worked about railroad tracks, and did not know that the track was in a dangerous condition. *Held*, that intestate was not guilty of such negligence contributing to his injury as to prevent a recovery. *pp.* 548-555.

RAILROADS.—*Street Employe.—Negligence.*—An employe engaged in shoveling gravel for a street contractor at a place near the railroad track where it had been deposited by the railroad company has the right to assume that the track is in safe condition for the passage of trains and that he may pursue his work of shoveling gravel without danger of injury from the derailment of a passing locomotive through the accumulation of gravel upon the track. *p.* 555.

From the Greene Circuit Court. *Affirmed.*

John T. Hays and *J. H. Drake*, for appellant.

A. D. Leach and *John S. Bays*, for appellee.

BLACK, J.—The controlling questions in this case arise upon the action of the court in rendering judgment for the appellee upon a special verdict. The appellee, widow of James M. Ridge, deceased, and administratrix of his estate, brought suit to recover damages for his death, caused by his being run upon by the appellant's locomotive engine, which was derailed while drawing a train of cars loaded with gravel near the place where the intestate was at work beside the railway track, engaged in loading a wagon with gravel. It appeared among the statements in the special verdict that Samuel H. Alkire was a street contractor, engaged in graveling certain streets of the town of Sullivan under a contract with the town; that pursuant to a contract between him and the appellant, the latter was carrying gravel from certain gravel pits some miles west of the town, and delivering it to the street contractor for his use in graveling

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the streets, the place of delivery being, as requested by him and agreed upon between him and the appellant, in the south part of said town, and between two parallel streets which ran south to and across the railway. The gravel was unloaded from the cars by the use of steam shovels and was deposited for the use of said contractor along the north and south sides of the railway track, and on the appellant's right of way. The gravel was so hauled and placed by the appellant for said contractor, to be loaded and hauled away by teams, by said contractor or his employes, to be used on the streets. A road or driveway for wagons ran along the north side of the railway and parallel therewith between said two streets and north of the gravel there deposited. Wagons for the conveyance of the gravel to the places where it was to be deposited on the streets were brought along said road to the place where the gravel was so deposited. The intestate was working under the employment of said street contractor, and as such employe was engaged in shoveling the gravel into one of said wagons, when the appellant's locomotive and train loaded with gravel, coming from the west at the rate of ten miles an hour, ran off the track about seventy feet west of the place where the intestate was so engaged, and the locomotive struck and fatally injured him. The injury occurred on the 17th of September, 1895. The appellant knew that the gravel was being loaded in wagons and hauled away by persons using teams for said contractor on and before the day of said injury. In order to make it safe for the intestate and others who were engaged in loading and hauling away the gravel, it was necessary to keep the tracks of the railroad free from the accumulation of gravel thereon along the place where the intestate and others were working, and it was found by the jury to be the duty of appel-

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lant to keep the railroad track where the gravel was unloaded, free from gravel, sand, and other obstructions, on and before the day of the injury, in order to keep the place safe for persons loading and hauling the gravel. It was further found, that the appellant failed and neglected to keep its track and iron rails over which its locomotives and cars were propelled free from gravel and sand at the point where the same were being so loaded on wagons, on and prior to the 17th of September, 1895; that gravel and sand did accumulate upon and over the irons and tracks of the appellant at said point, where it was being unloaded by the appellant for said street contractor, in sufficient quantities to render the same dangerous to propel locomotives and cars over the same, on and before said day; that the appellant and its servants, agents and employes, knew of said dangerous condition of the track on and before said day; that the gravel had been permitted by the appellant to accumulate upon its tracks to such an extent and in such quantities as to render the track unsafe to propel locomotives and cars upon and over the same for from fifteen to twenty days prior to the day on which the injury occurred; that there was an accumulation of sand and gravel upon the railroad track at a point near where the intestate was injured, at the time and just before he received the injury; that the appellant by its agents, servants, and employes having the management of the locomotive and train of cars that caused the death of the intestate, could have seen "such accumulation of gravel and sand on said track in time to have avoided the same if they had been looking before running upon the same on the morning that the decedent received his fatal injury." It was found that the appellant did not exercise ordinary care in keeping its track free from the accumulation of gravel where it had so un-

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loaded it. It was also found that said locomotive and cars belonging to appellant did leave the appellant's railroad track by reason of the careless and negligent manner in which the appellant permitted the gravel to accumulate upon said track at the place where the locomotive and cars did leave the track; that the injury from which the intestate died was the result of the appellant carelessly and negligently permitting the accumulation of gravel upon its tracks in sufficient quantities to throw the locomotive and certain cars attached thereto from the track.

It was found that the intestate was a farmer of that neighborhood, and had no experience in working about railroads or railroad tracks before the day of his injury; that at the time of his injury he was employed by said street contractor to assist in loading gravel in wagons for the purpose of having the same hauled to such points on the streets as the street contractor might direct; that in loading the gravel from the north side of the railroad track where the intestate was injured, it was necessary to drive the wagon which he was assisting in loading, along parallel with the railroad track and its embankment; that the intestate was engaged in loading gravel on a wagon with a shovel about 9:00 a. m., and had been so engaged about an hour and a half; that he had never been so engaged before; that he was not familiar with the surroundings and conditions of the appellant's railroad tracks at and about that place; that he did not know that gravel unloaded by the appellant's agents and employes had been permitted to accumulate around, about, over and upon the line of the railroad and its track where the gravel was being unloaded, to such an extent that it had partially enveloped the iron rails of the railroad track, and had become packed between the rails thereof so as to make

the passage of locomotives and cars over the track unsafe; and during the whole time he worked shoveling gravel at said place he did not know that there was any danger of the locomotive or cars going off the track at said point by reason of any obstruction along the line of the track. The train was running from the west, and the intestate was working with his face toward the east, when the locomotive went off the track. The locomotive and two cars of the train left the track at and near the place where he was so at work. They were caused to leave the track by accumulation of gravel upon the track. In leaving the track the locomotive ran over and upon the side of the embankment and fell off the embankment and against the intestate, while he was so engaged at work shoveling gravel. The embankment upon which the railroad tracks ran was about four feet high. The intestate could not see the railroad track and the condition thereof, and the rails of the track and condition thereof, at the point where he was at work while so engaged at work, from the time he commenced working until he received the injury. He did not see that the railroad track was so obstructed with gravel as to render it dangerous for a locomotive or train of cars to travel thereon, from the time he commenced work until he was injured. He could not have seen the track and rails of the railroad, and could not have ascertained its condition from the place where he was injured.

The jury answered that from the ultimate facts found by them, and as shown by the evidence, the intestate was using ordinary care and caution for his own safety under all the circumstances, as shown by the evidence, at the time he received said injury. It was also found that the general manager of the appellant resided at said town, and that he visited the place where the gravel had been deposited at and near the

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place where the intestate received his injury, on that morning, and often before that time; that said general manager saw and knew of the tracks and roadway of the appellant being obstructed by gravel in such a manner as to render the track in a dangerous condition to persons working about it when the locomotive and cars passed thereon, on and before the day the intestate was injured.

The train or engine which caused the injury left the track at Section street. The intestate was not upon the track on the day of his injury, and had not been upon the track at or near the place where he was injured, before receiving his injury. He had not been on the south side of the track on said day before receiving his injury. He had not worked at loading gravel into wagons on the south side of the track before receiving his injury on said day. He was six feet from the track when the engine left the track. His hearing and eyesight were good. A train coming from the west could be heard one-fourth of a mile away and could be seen one-eighth of a mile away. He did not make any effort to ascertain whether or not the track was obstructed with gravel, or to ascertain the condition of the track as to safety. He could have seen the train coming, if he had been looking, in time to have gotten to a place of safety, and he could have heard it, if he had been listening, long enough before it left the track to have gotten to a place of safety. He was assisting one Ed Newsom to load his wagon when the train came in sight, and when injured was near the wagon which Newsom was driving. Newsom got into the wagon after the train came in sight. One Brewster was near the intestate before the engine left the track. After the engine was seen coming, and before the injury, Brewster ran. Between the time when the train came in sight and the

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time of the injury, the intestate "gave back." The teams and wagons of persons engaged in hauling gravel that morning, passed over the track at or near where the engine left the track, prior to the time when it did so. The teams and wagons passing over the tracks for or with their loads of gravel caused the gravel to spread upon the rails and tracks at or near the place where the engine left the track.

One of the interrogatories to the jury was as follows: "Did the teams and wagons used on the morning of September 17, 1895, in hauling gravel, in passing over the track, cause the gravel to spread upon the same, so as to endanger the safety of the train in passing over the same?" The jury answered: "To some extent."

About thirty teams were hauling gravel that morning before the injury. The gravel was not being unloaded at a regular station. The gravel was furnished by the Merom Gravel Company. The intestate was not in the employ of the appellant. The contractor for whom the gravel was being delivered at said place, in order to have it so delivered, agreed with the appellant that, after the gravel was unloaded and the track was cleared up from obstructions of gravel caused by unloading, the contractor would keep the track clear from obstruction caused by removing the gravel. The contractor had one Robert Gilkerson at the track in charge of the work at the point where the intestate was injured.

The verdict contained the following interrogatories and answers: "Was said Gilkerson employed by said Alkire to see that the track was kept free from obstructions of gravel while hauling same away, on the 17th day of September, 1895? Answer. Yes." "If your answer to last preceding interrogatory be yea, was said duty performed? Answer. No."

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It was further found that the appellant's section foreman, Bedwell, on that morning, did not clear the track and put it in proper shape for the passage of trains; that he did not at all that morning clear the track. The engine which hurt the intestate was hauling a train loaded with gravel, to be delivered to the contractors at the place where the intestate was hurt. The condition of the track at all points where the gravel was being unloaded was not in plain view to all persons engaged in hauling or loading gravel.

In support of the claim that the appellant was entitled to judgment on the verdict, it is suggested that it fails to show the intestate to have been free from contributory negligence; that he had, or by ordinary care and diligence should have had, equal knowledge of the danger with the appellant; and that, being in the employ of the street contractor, he had no better right to recover than the latter would have had if he had been injured. We think it sufficiently appears that the intestate did not by his own negligence contribute to his injury, but exercised ordinary care. He was in the performance of his duty as an employe of the street contractor. It was not a part of his duty to go to the place where the dangerous condition of the railway track could be seen, and he had not been to that place and did not know the condition of the track. He had the right to assume that the track was in a fit condition for the passage of trains, and that he might pursue his work of shoveling the gravel without danger of injury from derailment of an engine through the accumulation of gravel upon the track.

The argument of counsel and the authorities cited therein embrace propositions of law relating to the rights and obligations existing between master and servant. The duty of the appellant toward the intestate was not that of a master toward his own servant,

and the obligation of the intestate was not that of a servant toward his own master. Such contractual relation did not exist between them. The intestate was rightfully present and engaged at work upon the premises of the appellant and near its approaching train, not as a servant of the appellant, not as a trespasser, and not as a mere licensee, but upon invitation of the appellant through the agreement between it and the street contractor for the delivery of the transported gravel at that place to be removed therefrom by the contractor through his employes, one of whom was the intestate. The fact that the place of delivery was not a depot or a place usually open to the public, can make no difference in the legal principle applicable. A place more convenient for the delivery of the particular freight having been adopted by agreement, the invitation to come thither to receive it and take it away imposed upon the appellant an obligation of care for the safety of those who rightfully came for such purpose of the same character as that owed by it to persons coming for the transaction of business with it to more public places selected and provided by it for such purpose.

The only matter apt to arrest particular attention in the examination of the verdict is that embraced in the findings relating to an agreement between the street contractor and the appellant concerning the cleaning of the track. It had been agreed between the appellant and the contractor that after the gravel was unloaded and the track cleared up from obstruction of gravel caused by unloading, the contractor would keep the track clear from obstruction caused by removing the gravel. The contractor had a man employed to see that the track was kept free from obstructions from gravel while hauling it away. It appears that neither this man nor the appellant cleaned

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the track. As between the appellant and the contractor, the duty rested upon the former first to clear the track from the obstruction caused by unloading, and then, that being done, it became the duty of the contractor to clear the track from the obstruction caused by removing the gravel. Teams hauling gravel had passed that morning over the track, and to some extent had caused the gravel so to spread upon the rails and tracks, at or near the place where the engine left the track, as to endanger the safety of the train in passing. It is not found that this spreading of the gravel caused the derailment of the engine, and it appears that the appellant had not performed its duty of removing gravel accumulated from unloading, and therefore no duty of the contractor under his contract with appellant had arisen respecting the gravel which was so spread. It appears that the appellant had failed to perform its duty to keep the track free from gravel, which it had permitted to accumulate upon the track so as to render it dangerous; that it had been in this condition many days, that the appellant had knowledge of the unsafe condition of the track at and before the time of the injury, and that the injury was caused by this accumulation permitted by the appellant, for which it was responsible.

Other matters are argued by counsel, but the merits of the cause are embraced in the special verdict. We have examined all objections discussed on behalf of the appellant, and we do not find in them any sufficient reason for disturbing the result reached in the trial court. The judgment is affirmed.

METROPOLITAN LIFE INSURANCE COMPANY v. BOWSER.

[No. 2,265. Filed April 21, 1898. Rehearing denied June 30, 1898.]

JUSTICES OF THE PEACE.—*Pleading*.—The complaint in a civil action originating before a justice of the peace will be treated as sufficient

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upon demurrer thereto for want of facts upon appeal to the circuit court, if it contain enough to inform the defendant of the nature of the plaintiff's claim, and be so explicit that a judgment thereon will bar another suit for the same cause of action. *p. 562.*

INSURANCE.—Action to Recover Premiums Paid.—An action to recover premiums paid on an insurance policy, on the ground that the policy is void *ab initio*, is not founded upon the policy. *p. 562.*

SAME.—Action to Recover Premiums Paid on Void Policy.—Payments of premiums on a policy of insurance which is void *ab initio* are not regarded as voluntary, and are recoverable as money had and received to the plaintiff's use. *p. 562.*

SAME.—Return of Premiums.—The question of the liability of an insurance company to return premiums paid on a policy of insurance depends upon whether there was a contract of insurance under which the risk was run by the insurer in favor of the insured. *p. 563.*

SAME.—Action to Recover Premiums Paid.—Complaint.—Sufficiency.—A complaint in an action before a justice of the peace to recover premiums paid on a policy of insurance, on the ground that the policy was void in that the application was not signed by the person whose life was insured, was sufficient to apprise defendant of the nature of the claim and to bar another suit for the same cause, and was good against a demurrer, although it was not averred that there was any rule of the company requiring such signature. *pp. 563, 564.*

PRACTICE.—Appeals from Justices of the Peace.—Pleading.—The rules of pleading before justices of the peace permitting all defenses to be made without plea, except the statute of limitations, set-off, matter in abatement, and the denial of the execution or the assignment of a written instrument, are applicable in the circuit court on appeal from justices, and no error was committed in sustaining a demurrer to paragraphs of answer setting up matters in defense not within such exceptions in a cause appealed from a justice of the peace. *p. 564.*

INSURANCE.—Action to Recover Premiums Paid.—Special Finding.—A special finding in an action to recover premiums paid on an insurance policy on the ground that such policy was void on account of the insured having failed to sign the application is not sufficient to sustain a judgment for plaintiff, where it is not found that the policy was void by reason of the application not being signed. *pp. 565-568.*

SPECIAL FINDING.—Practice.—Where a special finding is silent as to any fact it will be treated as a finding against the party having the burden of proving such fact. *p. 568.*

From the Allen Circuit Court. *Reversed.*

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Zollars & Worden, for appellant.

H. I. Smith and R. B. Dreibelbiss, for appellee.

BLACK, J.—The appellee brought her action against the appellant before a justice of the peace to recover back certain amounts paid by her as premiums upon six policies of insurance. On appeal from the justice, an amended complaint was filed in the court below in six paragraphs. A demurrer to each paragraph for want of sufficient facts was overruled.

In the first paragraph it was stated that the appellant was a life insurance company, organized under and pursuant to the laws of the state of New York, and was doing a life insurance business in the city of Fort Wayne, Allen county, Indiana; that it had its regular established agency at that city for the purpose of soliciting insurance for the appellant; that on or before the 5th day of March, 1894, the appellant by its agent doing business for the appellant in said city, importuned the appellee to take out an insurance policy upon the life of one Daisy M. L. Bowser, "who is a minor," said agent representing to appellee that the same could be had upon said life, and that the application for the same need not be signed by the insured; whereupon an application was made upon said life, and the same was signed by some person other than the appellee or said Daisy M. L. Bowser, in the name of said Daisy M. L. Bowser; that on the 5th day of March, 1894, the appellant issued policy No. 9,545,315 upon the life of said Daisy M. L. Bowser to appellee for \$128.00, with a payment of a weekly premium of ten cents; that the appellee paid said premiums as the same became due, and had paid the same up to and including April 15, 1895; that appellee had done everything on her part to be performed; that on the — day of —, 1895, the appellant notified the

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appellee that said policy had been illegally issued, and was void, and that the appellant had lapsed the same for said reason, whereupon the appellee demanded of the appellant that the amount of said premiums so paid be returned to her; that the appellant refused and still refuses so to pay; that appellee could not more specifically state the day of "said cancelation;" that there had been paid by appellee on said policy, in weekly payments, the sum of \$6.00; that said policy was void for the reason that the application for said policy was never signed by the assured; that the appellant had had the use of the money so paid in, and that the interest for the equated time of said payments was thirty cents; that there was due and unpaid to the appellee said sums, amounting to \$6.30; wherefore, etc.

The second paragraph of the amended complaint, after introductory matter like that in the first, alleged that, on or before the 8th day of May, 1893, the appellant, by its agent doing business for said company in said city, importuned the appellee to take out an insurance policy upon the life of one George Killen, said agent representing to appellee that the same could be had upon said life without his knowledge or consent, and that the application for the same need not be signed by the insured, upon which the appellee relied, whereupon an application was made upon said life, and the same was signed by some person other than said Killen, "who was and is now unknown to plaintiff," in the name of said Killen, and upon the 8th day of May, 1893, the appellant issued policy No. 8,621,343 upon the life of said Killen to the appellee for \$122.00, with a payment of a weekly premium of ten cents; that the appellee paid said premiums as they became due, "and has now the same paid in advance" to October 14, 1895; that appellee had done and performed

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every thing on her part to be performed; that on the ——— day of ———, 1895, the appellant notified the appellee that said policy had been illegally issued and was void, and that the appellant had lapsed the same for said reason, whereupon the appellee demanded of the appellant that the amount of said premiums so paid be returned to her, and that the appellant refused and still refused so to pay; that appellee could not more specifically state the date of said cancelation; that "said policy is void, and that the same is void for the reason that the application for said policy was never signed by the assured, and for the further reason that the plaintiff has no insurable interest in the life insured, neither by blood or marriage or as a creditor, and that the same was void at the time it was issued;" that appellee is an uneducated and ignorant woman and unacquainted with the ways of business; that there had been paid by the appellee on said policy, in weekly payments, the sum of \$12.80; that the appellant had had the use of said money as paid in, and interest for the equated time of said payments was eighty-seven cents; that there was due and unpaid to the appellee said sums amounting to \$13.67; wherefore, etc.

The third paragraph related to a policy upon the life of one Elizabeth Etzel, the fourth to a policy upon the life of one Henry Guth, the fifth to a policy upon the life of one Caroline Yohey, the sixth to a policy upon the life of one Louisa Guth. All the paragraphs after the second were like it except as to the names of the persons upon whose lives the policies were issued, the dates, the numbers of the policies, the amounts for which the policies were issued and the amounts of the premiums, and, except that in the fourth paragraph after the allegation that the appel-

lee had no insurable interest in the life insured, the words "neither by blood or marriage or as a creditor," or equivalent words were not inserted, and in the sixth paragraph the word "blood" was not used in that connection.

Much indulgence must be extended to pleadings in causes commenced before a justice of the peace. It is well settled that in a civil suit originated before a justice of the peace, a complaint will be treated as sufficient upon demurrer thereto for want of facts, upon appeal in the circuit or superior court, if it contain enough to inform the defendant of the nature of the plaintiff's claim, and be so explicit that a judgment thereon will bar another suit for the same cause of action. *Beineke v. Wurgler*, 77 Ind. 468; *Milhollin v. Fuller*, 1 Ind. App. 58; *Clifford v. Meyer*, 6 Ind. App. 633. Many cases may be found in our reports wherein complaints in causes commenced before justices have been held sufficient when doubt has been expressed as to their sufficiency if tested by the rules of good pleading in causes originating in courts of general jurisdiction.

The action to recover back premiums on the ground that the policy is void *ab initio* is not founded upon the policy. It proceeds rather upon the theory that there is no valid policy, but that the premiums have been paid upon a consideration which has failed. Such payments are not regarded as voluntary, and they are recoverable as money had and received to the plaintiff's use. See *Waller v. Northern Assurance Co.*, 64 Ia. 101, 19 N. W. 865. If the risk has not attached, the premium paid (which is dependent upon the risk and regulated by it), in the absence of fraud on the part of the assured, must be returned, for it has not been earned. If there be no fraud of the insured, though there be negligence on his part, he may recover, if

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there be no risk run by the insurer. *Jones v. Insurance Co.*, 90 Tenn. 604, 18 S. W. 260, 25 Am. St. 706; *Joyce on Insurance*, section 1390, and cases cited.

The liability to return the premiums paid depends upon whether there is a contract of insurance under which a risk is run by the insurer in favor of the insured. To constitute such a contract there must be parties capable of contracting. If the case could be said to present for consideration a contract of insurance with an infant, such a contract for his benefit is not void, but only voidable at his election. The insurance company in such case could not avoid the policy merely upon the ground of the infancy of the insured. *Monaghan v. Agricultural Fire Ins. Co.*, 53 Mich. 238, 18 N. W. 797. Where a minor takes out a policy of insurance on his own life, he can not, on reaching majority, in the absence of fraud and unfairness, recover back premiums paid by him upon the ground alone of his infancy, such a contract not being void. *Johnson v. Northwestern Mut. Life Ins. Co.*, 56 Minn. 365, 57 N. W. 934, 59 N. W. 992.

It is alleged in each of the paragraphs of complaint that the policy was void for the reason that the application was not signed by the person whose life was insured. It is also alleged in each paragraph that the appellant had notified the appellee that the policy had been illegally issued and was void, and that the appellant had lapsed the policy for that reason. If the policy was issued subject to a rule of the insurance company that it should be void unless the application were signed by the person upon whose life the policy was issued, and if it may be properly said that a policy issued without compliance with such rule would be only voidable and that compliance might be waived by the insurance company, yet such a waiver would be a matter of defense to be set up by the appellant, and

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it here appears in the complaint that the company had not elected to avail itself of the privilege of waiver, but had canceled the policy because illegally issued.

The complaint in each paragraph apprised the appellant that the ground on which the appellee's claim rested, was that the application had not been signed by the person whose life was insured; and though it was not stated that a provision requiring such signature was contained in any rule or regulation, or in the application, or shown that it entered in any manner into the contract, yet we think each paragraph apprised the appellant of the nature of the appellee's claim, and that a recovery would bar another suit for the same cause of action; and we are of the opinion that under the very liberal rule relating to complaints before justices of the peace, we must hold each paragraph sufficient. See *Fisher v. Metropolitan Life Ins. Co.*, 160 Mass. 386, 35 N. E. 849; *Fisher v. Metropolitan Life Ins. Co.*, 162 Mass. 236, 38 N. E. 503; *Fulton v. Metropolitan Life Ins. Co.*, 19 N. Y. Supp. 660.

Before the justice of the peace the appellant filed an answer in one paragraph, being a general denial. In the circuit court the appellant filed an answer in seven paragraphs, each setting up affirmative matter. A demurrer to these seven paragraphs of answer was sustained, the record entry of this ruling stating that the demurrer was sustained, "the answer of general denial having been filed in the justice's court." The rules of pleading before justices of the peace are applicable in the circuit court on appeals from justices, and all defenses except the statute of limitations, set-off, matter in abatement and the denial of the execution or the assignment of a written instrument, may be given in evidence without plea. *Campbell v. Nixon*, 2 Ind. App. 463, and authorities cited. Under this rule,

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there was no available error in the action of the court upon the demurrer to the answer, which did not in any of its paragraphs contain any matter of defense which could not be shown under the general denial, or without plea.

The cause was tried by the court, and there was a special finding. The appellant has presented for our consideration the question as to the correctness of the court's conclusions of law upon the facts stated in the finding. We understand the complaint as proceeding upon the theory that the policies in question were issued to the appellee upon the lives of other persons, whose lives were insured for her benefit, and not upon the theory that the policies were issued to the persons whose lives were insured, or that the contracts of insurance were made for their benefit. The facts relating to each policy are set out in a separate paragraph of the finding. It is stated in each instance that a policy of the appellant having a specified number was issued on the application, upon the life of a person named, but it is not stated to whom any of the policies were issued or for whose benefit the insurance was contracted. There are no facts in the finding showing affirmatively, with relation to any of the policies, that the appellee did not have an insurable interest in the lives insured. She might have had an insurable interest in each of the lives, so far as appears from the facts stated. It is not shown whether or not the appellant had canceled any of the policies or asserted the invalidity thereof in any manner. There is nothing in the finding upon that subject. It is stated that the appellee paid premiums as they became due, and paid on each policy a certain amount, and that before the bringing of this action she demanded of a certain person, described as an agent and superintendent of agents of the appellant, that the amount of

premiums so paid be returned to appellee, which was refused by the appellant. It is shown in relation to each policy that an agent of the appellant importuned the appellee to take out an insurance policy upon the life of a person named. The persons so named are described respectively as the minor daughter of appellee, her son-in-law, her brother, her two nieces, and the mother-in-law of her niece. It is found in each instance, that the agent represented to the appellee that a policy of life insurance could be had upon the life of the person named without the knowledge or consent of such person, and that the application for such policy need not be signed by such person; that the appellee relied upon the representations made by the agent; that an application of said company for insurance was prepared by said agent at that time upon the life of such person without his knowledge or consent, and the name of such person was attached thereto, but it was not signed by such person or by the appellee; that on a day stated, in pursuance of the application, the appellant issued a Metropolitan Life Insurance Company policy of a number mentioned upon the life of such person and upon said application, with a payment of a weekly premium of a specified sum; that said policy was issued upon said life without the knowledge or consent of such person, who was ignorant of the same up to the time of the bringing of this action, except that as to said minor daughter, the policy on whose life was issued on the 5th day of March, 1894, the premiums on which were paid by the appellee to the 15th of April, 1895, it was found that about a year after the issuing of the policy, and when the daughter was about eighteen years of age, she was induced by an agent of the appellant to sign, and did sign, a supplemental application for the policy so issued on her life, upon the representation of the agent

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that as the policy was void because she had not signed the original application, to make the policy good it was necessary for her to sign a supplemental application prepared by the appellant for that purpose. There is no finding that there was any requirement in the application, or by any rule or by-law or otherwise, that the application for insurance upon the life of one person for the benefit of another, to whom the policy was to be issued should be signed by the person whose life was to be insured.

If, as is sufficiently shown by the finding, the contracts were made in good faith on the part of the appellee (without which there could be no recovery in such an action as this), the policy issued to her would not be void merely because the persons whose lives were insured did not sign the applications (which was the ground of invalidity relied upon in the complaint), in the absence of any requirement that they should so sign. The form of the application is not given. The application does not appear to have been in the form of a proposal from the person whose life was insured, and it is not shown in what connection or for what purpose the name of such person was attached, or that there was even in the form of the application an indication that it was to be attached. Supposing the parties to the contracts to have been the appellant on the one side and the appellee upon the other, the former being represented in the procurement of the latter's proposal for insurance by the appellant's own agent, authorized to solicit and forward such proposals, and it not being necessary so far as appears that the applications be signed by the persons whose lives were insured, it would seem that the company could not have resisted payment of such a policy, in case of the death of the person whose life was insured at a time when all premiums had been paid up according to the con-

tract, merely upon the ground that such person had not signed the application, but the company's agent had himself caused the name of such person to be attached to the application, such person not being a party to the contract. If this were an action brought by the appellee upon one of these policies, issued to her, and the only defense set up to a sufficient complaint were that the company's agent for soliciting proposals, making representations as in this case, without fraud on the part of the appellee, had made out applications as in this case, no violations of any rule or by-law or other provision of the company or requirement of statute relating to the application appearing, would the company be permitted to escape liability upon its contract on such ground? Inasmuch as the finding showed the issuing of certain policies of insurance on the lives of certain persons, it perhaps might be said that the finding shows that there was evidence before the court from which it might and should have found to whom the policies were issued, and that if the finding upon this matter were regarded as necessary to the appellee's recovery, it would be our duty to give the appellee an opportunity to have another trial of the cause; but the finding is wanting in facts necessary to the appellee's case, as to which, so far as appears in the finding, there was no evidence. There is no indication that there was any rule or regulation requiring the signatures of the persons whose lives were insured. The burden was upon the appellee to show that the policies were void *ab initio*, for a reason stated in the complaint. It is a familiar rule, that where the special finding is silent as to any fact, this is to be treated as a finding against the party having the burden of proving such fact. Under this rule, we must sustain the appellant's exception to the conclusions of law. The judgment is reversed, and the

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cause is remanded, with instruction to state conclusions of law in favor of the appellant, in accordance with this opinion.

INDIANA, DECATUR AND WESTERN RAILROAD COMPANY
v. ZILLY.

[No. 2,448. Filed July 1, 1898.]

RAILROADS.—Common Carrier.—Liability for Lost Baggage.—A railroad company is the insurer of the baggage of a passenger until its arrival and discharge at the place of its destination, and until the owner has reasonable time and opportunity to claim it and remove it. *p. 574.*

SAME.—Common Carrier.—Baggage.—Where a passenger is informed of the particular time of the arrival of his baggage, notice of its arrival is not necessary in order to relieve the carrier of its liability as a common carrier. *p. 574.*

SAME.—Common Carrier.—Baggage.—Warehouseman.—Where baggage is not called for within a reasonable time, it is the duty of the carrier to store it, and when this is done its liability as a carrier ceases, and that of warehouseman attaches. *pp. 574, 575.*

SAME.—Baggage.—Liability as Warehouseman.—A railroad company is only bound to the exercise of ordinary care in storing and caring for unclaimed baggage. *p. 575.*

From the Hendricks Circuit Court. *Reversed.*

A. L. Mason and Will H. Latta, for appellant.

James G. Miles and Ethan A. Miles, for appellee.

HENLEY, C. J.—The complaint in this cause was in two paragraphs. The first paragraph charged appellant with liability for the loss of the contents of a trunk, delivered to appellant and held by it as a common carrier. The second paragraph of complaint proceeds upon the theory that the appellant was liable to appellee for the loss of the contents of the trunk, charging appellant as a warehouseman. The cause was tried upon the issues formed by the denial of the material allegations of the complaint. The lower court found in favor of appellee, and overruled appel-

lant's motion for a new trial. This action of the lower court is here assigned as error by appellants. Amongst the reasons assigned in the motion for a new trial and urged by counsel for appellant in this cause are these: That the judgment of the court in this cause is not sustained by the evidence; and that the judgment of the court is contrary to law.

The evidence is before us, embodied in a proper bill of exceptions, and presents the following undisputed facts: That the appellant is a corporation, and owns and operates a line of railroad 152 miles in length, between the cities of Decatur, Illinois, and Indianapolis, Indiana, and that its said road passes through the town of North Salem, Indiana, where it has a station consisting of a one-story frame building and a platform; that this building contains three rooms, the agent's room in the center, the waiting room to the right of the agent's room, and the baggage room to the left of the agent's room; that the outside doors leading into the baggage room are large doors, of double thickness of wood, and fastened with heavy chains on the inside; that the outside doors of the waiting room are heavy pine doors, locking with a key; that the doors, two in number, leading from the agent's room into the baggage room, and one leading from the agent's room to the waiting room are ordinary doors with ordinary fastenings and are inside doors and were not locked on the night of Sunday, the 20th day of October, 1895; that there are no outside windows to the baggage room, and that the windows to the waiting room are about three and one-half feet across, three feet above the ground, and consist of one upper and one lower sash made from pine wood and painted and sanded; that these windows were all fastened by iron fastenings at the place where the lower and upper sash met. These fastenings were each attached to the

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window sash by two screws about one inch long. Across each of the outside windows, in addition to the fastenings above referred to, and upon the outside were six wooden slats about two inches wide, one inch thick and four feet long; these were also painted and sanded and were fastened by two rails and one screw in each end of each slat, and were placed about eight inches apart; that appellant's agent is present at this station between the hours of 7 and 11:30 a. m., and between the hours of 1:30 and 5:30 p. m., and 6:30 and 8:30 p. m., and that the town of North Salem, where said above described station was situate, has a population of about 800 souls; that there is no other railroad leading to said town except the road owned and operated by appellant, and that said station is situate in the south west part of said town of North Salem, there being no residences nearer thereto than about twenty rods; that on the 11th day of October, 1895, the appellee, who is a resident of the state of Kansas, left her home at Eureka, in said state, to go to the town of North Salem, Indiana, and at the same time she checked her trunk, containing articles that were afterward lost to her; that she first purchased a ticket for Kansas City, Missouri, and had her trunk checked to said last named station; that her trunk was locked and corded when delivered to the agent at Eureka, Kansas; that she arrived in Kansas City on the morning of October 12th and rechecked her trunk at that point to North Salem, Indiana, and that at that time her trunk was corded and locked; that she purchased a ticket by way of the Wabash Railway, to Decatur, Illinois, and thence by way of appellant's road to North Salem; that appellee arrived at North Salem at about 3 o'clock a. m. Monday, October 14, 1895; that while upon appellant's train, appellee inquired of one of the brakemen thereon, and also of the

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conductor of the train upon which she was riding, as to whether or not her trunk was upon the train and would be delivered to her upon her arrival at North Salem; that she was informed both by the conductor and brakeman, to whom she had addressed her inquiries, that the train upon which she was riding did not carry her baggage because of its arrival at her destination in the night time, but that her trunk would follow on the day train, which arrived in the afternoon of the same day of her arrival, and in accordance with the information thus given her, her trunk arrived on the same day, having been carried by the day train, and was delivered to the agent at North Salem on the afternoon of Monday, October 14, and placed in appellant's baggage room, where the same remained until the 21st day of October, 1895, being Monday of the week following its arrival; that upon appellee's arrival at North Salem, she was conveyed by her brother to the home of her father and mother, about six miles in the country; that at that time her mother was very sick and the brother of appellee made daily trips to the house where appellee was visiting from the town of North Salem; that the agent of appellant was present at said station daily during the regular hours before mentioned, and was ready at all times to deliver said baggage upon proper demand and presentation of the check for the same; but that during all of said time no demand was made for said trunk, and the same remained in said baggage room as aforesaid up to and until the time before mentioned; that on the night of Sunday, October 20, some unknown person by means of a chisel sixteen inches long and two inches wide, removed one of the slats from one of the outside windows in said station and by placing said chisel under the lower sash of the window broke the fastening and effected an entrance

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into said station, and on the morning of October 21, a brother of appellee called for said trunk and presented a check therefor to the agent of appellant, and the same was delivered to him, but said trunk had upon the night of Sunday, October 21, by some unknown person, been broken open, the cords cut and hinges broken and articles of value taken from said trunk; that no notice was given to the appellee of the arrival of her said trunk; that the trunk did not have upon it appellant's name and residence, but had the name borne by her prior to her marriage, and that appellant's agent did not know appellee either by her present name or by the name written upon her trunk; that he inquired of persons living in the town of North Salem as to the whereabouts or residence of the party whose name appeared upon the trunk, but received no information thereabout.

It is also shown by the evidence that the doors leading from the room occupied by appellant's agent were not locked. These were inside doors. There was a saw mill and several large piles of lumber near the station. The station was located about one half mile from the business portion of the town, and the dwellings extended down to near the station. It was also shown by the evidence that this station and baggage room in which appellee's trunk was stored was such a station and baggage room as is ordinarily used by railroad companies in towns of 800 to 1,000 people, for the transaction of their business, and the reception and retention of baggage until called for.

It will thus be seen that appellee's baggage remained in the baggage room undisturbed and uncalled for, during a period of seven days, before the station was broken into and the articles taken from the trunk. Under the authorities, appellant's liability as a carrier had ceased long before the loss herein

complained of. Where a passenger has notice of the rules and regulations of the company, and the rules and regulations are reasonable, regarding the manner of transporting and delivering baggage, the passenger is bound thereby although not directly assenting thereto. *Gleason v. Goodrich Trans. Co.*, 32 Wis. 85.

It was held in the case of the *Chicago, etc., R. R. Co. v. Addizoat*, 17 Ill. App. 632, that a railroad company is the insurer of the baggage of a passenger as long as the relation of a common carrier exists, and that such relation exists as to such baggage until its arrival and discharge at the place of destination, and until the owner has reasonable time and opportunity to claim it and remove it. If such baggage is not called for within a reasonable time, the company should store it in its warehouse, and from that time its liability as a carrier ceases and the liability of a warehouseman is assumed. It was also held in the same case, and we think correctly held, that a passenger can not prolong the strict and rigid liability of a railroad company as a common carrier, longer than is reasonably necessary under the circumstances of the particular case, or for any purpose of his own convenience; and that if a passenger is informed that his baggage has not arrived on the train he came on, and no directions are given concerning it, and no information to identify himself, so that notice of its arrival can be given him, it is his duty to make inquiry for his baggage within a reasonable time after the arrival of the next train. In the case at bar the appellee was informed of the particular time when her trunk would arrive, and no notice of its arrival was necessary to relieve appellant of its liability as common carrier. *Bansemmer v. Toledo, etc., R. W. Co.*, 25 Ind. 434, 87 Am. Dec. 367. It is the undisputed law that, where baggage is not called for within a reasonable time, it is

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the duty of the carrier properly to store it, and when this is done its liability as a carrier ceases and that of warehouseman attaches. *Mote v. Chicago, etc., R. R. Co.*, 27 Iowa 17, 1 Am. Rep. 212; *Bartholomew v. St. Louis, etc., R. R. Co.*, 53 Ill. 227; *Wald v. Louisville, etc., R. R. Co.*, 92 Ky. 645, 18 S. W. 850; *Burnell v. New York, etc., R. R. Co.*, 45 N. Y. 184; *Galveston, etc., R. W. Co. v. Smith*, 81 Tex. 479, 17 S. W. 133; *Cincinnati, etc., R. R. Co. v. McCool*, 26 Ind. 140; *Bansemmer v. Toledo, etc., R. W. Co., supra*.

It was the duty of appellant, under the facts in this case, when appellee's trunk arrived, to place it in the baggage room, appellee not being present to receive it, and the liability of appellant then ceased to be that of common carrier and became that of warehouseman. It was not necessary that such baggage room be fire-proof or burglar-proof, but it was only necessary that it be such a place as persons of ordinary prudence, under like circumstances, would use for the storage of such goods. *Chicago, etc., R. R. Co. v. Fairclough*, 52 Ill. 106. Ordinary care, is all that the law requires. *Cincinnati, etc., R. R. Co. v. McCool, supra*.

It would not be required of appellant that it keep a night watch about its baggage room, or to have some one sleep therein, when, as it is shown in this case, no baggage was delivered at this station from the night trains. In such cases there could be no need of any such precautions. See *Pike v. Chicago, etc., R. W. Co.*, 40 Wis. 583.

The evidence in this case conclusively shows that appellee failed to call for her baggage within a reasonable time after the time when she was informed that it would arrive; that appellant at the time of the taking of appellee's goods, by some person unknown to either party to this action, occupied toward appellee the relation of a warehouseman, and not of a common

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carrier; and that appellant used ordinary care in providing a reasonably safe place to store said trunk, under the facts as presented by this case. Appellee's goods were not lost by any negligent act of appellant, nor by the omission to perform any duty which it owed to appellee. There is no conflict in the evidence. The finding and judgment of the court is contrary to law. Cause reversed, with instructions to sustain the motion for a new trial.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY
v. WILLIAMS.

[No. 2,465. Filed July 1, 1898.]

EVIDENCE.—Weight Of.—Contributory Negligence.—The Appellate Court will not weigh the evidence for the purpose of determining whether or not the plaintiff in an action for damages on account of personal injuries was guilty of negligence contributing to her injury. *p. 577.*

CONTRIBUTORY NEGLIGENCE.—When Question for Jury.—When the facts are such that different conclusions may reasonably be drawn therefrom, the question of contributory negligence is one of fact for the determination of the jury under proper instructions from the court. *pp. 577-581.*

INSTRUCTIONS.—Contributory Negligence.—Railroads.—Damages.—No error was committed in instructing the jury in the trial of an action against a railroad company for damages on account of personal injuries received at a railroad crossing, that the jury might take into consideration the failure of the defendant to sound the whistle and ring the bell as required by statute in determining the question of plaintiff's conduct before and at the time she approached the crossing, where the jury was also instructed that the negligence of the defendant in failing to give the statutory signals did not excuse plaintiff from the exercise of due care. *pp. 581-588.*

SAME.—Damages.—Permanent Injuries.—When Question of Fact.—Where there was evidence from which the jury could have concluded that plaintiff's injuries were permanent, no error was committed in instructing the jury that in the assessment of damages they might determine whether or not the injuries were permanent, although there was no direct evidence that the injuries were of a permanent nature. *p. 588.*

DAMAGES.—Assessment.—Personal Injuries.—Peril of Life.—The jury

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may take into account the peril of plaintiff's life at the time of the accident as an element of damages in the assessment of damages in an action for personal injuries. pp. 588, 589.

From the Posey Circuit Court. *Affirmed.*

Alexander Gilchrist and *Curran A. De Bruler*, for appellant.

G. V. Menzies, for appellee.

ROBINSON, J.—Appellee recovered a judgment for alleged personal injuries caused by appellant's negligence. The error assigned is the overruling of appellant's motion for a new trial. The only reasons for a new trial which are discussed by counsel are, that the verdict is not sustained by sufficient evidence, the giving of certain instructions, and the refusal to give others requested by appellant.

The jury returned a general verdict, and with it answered three interrogatories; which in no sense conflict with the general verdict. It is earnestly argued that on the evidence of appellee herself, she was guilty of contributory negligence in approaching the crossing. But a careful review of all her evidence and all the other evidence in the case leads us to the conclusion that we can not say, as a matter of law, she was guilty of such negligence without weighing the evidence, and this we can not do.

What appellee says she did at the time must be taken in connection with all the other facts and circumstances in the case. The jury may have concluded from all the testimony, and could have done so, that the train was running about thirty-five miles an hour; that it neither sounded the whistle nor rang the bell at any time as it approached the crossing; that appellee stopped and looked and listened for a train at two different points within 300 feet of the crossing, the last about 150 feet, and saw and heard nothing either

time; that when within fifty feet of the crossing and as soon as she could look both ways she did so; that not knowing from which direction a train might be coming, she looked in the wrong direction first, and when she did look in the right direction, the train was upon her; that there were obstructions consisting of picket fence, corn, briars, weeds, and brush partially obscuring the view in the direction from which the train was coming, after she reached the end of the cut; that the cut extended up to the right of way; that some wind was blowing in a direction which would carry the noise of the train from her as she approached the crossing; that when a person is on the highway in this cut, it depends on how the wind is blowing whether he can hear an approaching train; that a person going down the hill into the cut in a buggy could not hear the train until the person got to the end of the cut, unless the train was down in front of the person; that a person cannot see the railroad track on the left until near the end of the cut, and that he can not see up the railroad track until he comes out of the cut. The jury answered, in an interrogatory returned with the general verdict, that if appellee had stopped at any point from the top of the hill to the crossing, she could not have heard the noise of the approaching train. The evidence is conflicting as to how far up the track she could see had she stopped within fifty feet of the track. The jury had the right to find the speed of the train and the speed at which appellee was going, and they did find she could have heard the noise of the train at no time. She had stopped twice on approaching the crossing. She saw no train and heard none. Whether she should have stopped a third time, immediately before entering upon the track, is a question about which there may well be a difference of opinion. The jury answered the question by its gen-

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eral verdict. This court can not take the same testimony, shorn of much of its probative effect, and decide the same question another way.

It is not the intention to go contrary to any rule laid down by the Supreme and this court. It is no longer a question in this State of what the rule is, but, what is its application to the particular case. In every such case submitted to a jury, the ultimate question they are called upon to decide by a general verdict, and which they do decide, and which it has been held over and over they may decide, is whether the complaining party acted as a reasonably prudent person would act under like circumstances. The jury and the trial court had, as no other tribunal can have, all the facts and circumstances placed before them, and they have answered the question in appellee's favor. That appellee did not stop the third time, and look and listen for a train, or that she started her horse in a trot after she stopped the last time, is not the decisive test. It is no more than an important and material fact to be considered by the jury in applying that which is the decisive test, namely, did appellee under all the circumstances surrounding her at the time, act as a reasonably prudent person would have acted. Thus, in a case where the evidence tended to show that a person did not look in the direction a train was approaching, and that if she had looked, she could have seen it in time to have avoided injury, the court said, and the doctrine is approved by the Supreme Court, that, "the fact that the deceased did not look for the approaching train was a material and important fact to be considered by the jury upon the point of contributory negligence; but her omission to do so was not in law decisive against a recovery." *Ohio, etc., R. W. Co. v. Stansberry*, 132 Ind. 533.

Whether she should have stopped or driven in a

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walk must be taken in connection with the precautions she had already taken; that she heard neither whistle, bell, nor the noise of a train; that she saw nothing and heard nothing indicating an approaching train. What she should have done under all the circumstances was a question about which reasonable men might differ. Thus it is said: "It is plain, however, we think, that in very many cases the question as to whether a person injured at a crossing exercises ordinary care under the particular circumstances, is one for the jury. The court cannot adjudge that negligence exists as a matter of law in any case, unless the facts are undisputed and the conclusions to be drawn therefrom are indisputable. "The question of negligence must be submitted to the jury as one of fact, not only where there is room for difference of opinion between reasonable men as to the existence of the facts from which it is proposed to infer negligence, but also where there is room for such difference as to the inferences which might fairly be drawn from conceded facts." *Cincinnati, etc., R. W. Co. v. Grames*, 136 Ind. 39, and cases cited. *Cleveland, etc., R. W. Co. v. Moneyhun*, 146 Ind. 147; *Board, etc., v. Bonebrake*, 146 Ind. 311.

It cannot be denied that in many cases a court may adjudge, as a matter of law, upon the undisputed facts in the case, that negligence does or does not exist. But, as is said by Judge Cooley in his work on torts, (2nd ed.) page 805, "In the great majority of cases the question of negligence on any given state of facts must be one of fact." In the case at bar it can not be said, after a careful review of all the evidence, that the facts going to show contributory negligence are undisputed, nor can it be said that the conclusions to be drawn from these facts are indisputable. The trial

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court properly submitted the question to the jury and the conclusion reached by them ought to stand.

It is well settled that there is a large class of cases where the court will say upon the undisputed facts that the injured party was guilty of contributory negligence, and it is also well settled that there is another large class of cases where the court will say that the injured party was not negligent; and it is equally well settled that between these two is another class where different conclusions may be drawn from a certain state of facts, and it is uniformly held that this class belongs to the jury under proper instructions from the court. As has been forcibly said in *Railroad Co. v. Stout*, 17 Wallace, 657, "Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proved, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain." The above language is quoted with approval in *Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261, 38 Am. Rep. 134. See, also, *Wabash, etc., R. W. Co. v. Locke*, 112 Ind. 404; *Louisville, etc., R. R. Co. v. Crunk*, 119 Ind. 542.

The eleventh reason for a new trial questions the eighth instruction given to the jury at appellee's re-

quest. This instruction is as follows: "In determining the question of plaintiff's conduct before and at the time she approached the crossing, you may consider the evidence as to the locality and obstructions, if there were such, which obstructed or interfered with plaintiff's view, or prevented her from seeing an approaching train; also anything, if there was such, which interfered with her hearing the noise made by a train in motion; also the failure of defendants, if that be true, to sound the whistle and ring the bell as required by statute." Appellant requested the court to instruct the jury that the question whether there was or was not a failure on the part of appellant's servants to blow the whistle for the highway crossing as required by the statute, could not be considered by the jury in determining whether appellee was at the time exercising due care. The question is thus presented, whether in cases of this character, the failure to give the statutory signals can be considered in determining the question of the contributory negligence of the injured party. Upon principle, the eighth instruction is right. Nor is it at variance with the adjudged cases. The court had warned the jury that the negligence of the company in failing to give the statutory signals did not excuse the want of due care on the part of appellee. The instructions must be considered as a whole. It cannot be said, as argued by appellant's learned counsel, that under the instructions the jury might decide that appellee was not guilty of contributory negligence because the statutory signals were not given. The instruction does not tell the jury that, if they find certain facts to exist they would show want of contributory negligence, but they were told that in determining the question of appellee's conduct before and at the time she approached the crossing they might consider certain

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things; among others, the failure to sound the whistle and ring the bell as required by statute. They were told in other instructions what that conduct should be in order to entitle her to recover.

In *Pittsburg, etc., R. W. Co. v. Martin*, 82 Ind. 476, the court said: "The signal required by the law not being given, the view being obstructed, and the plaintiff not being hard of hearing, he had no reason to suppose that the train was within eighty rods of the crossing; he was misled by the defendant's negligence in omitting the proper signal; he was not guilty of negligence in assuming, in the absence of any indication to the contrary, that the company was obeying the law, and that no engine was advancing toward the crossing within a distance of eighty rods."

In the case of *Indianapolis, etc., R. R. Co. v. McLin*, 82 Ind. 435, the court said: "He [the party injured] looked and listened, but could neither see nor hear an approaching train. No bell was ringing, no whistle sounding. Everything indicated the absence of danger. He had a right to know, for such is the law, that it is quite as much the duty of the appellant to give timely warning of the approach of its cars to the crossing, as it was his duty to listen for such warning. He listened, but there was no warning; he looked but no train or danger could be seen. This was all the law, under the circumstances, required. While it is true that the failure of the appellant to give warning did not relieve the appellee's son from exercising care to avoid injury, yet the absence of such warning is a circumstance to be taken into consideration in determining whether he did exercise the degree of care required or not."

In *Cleveland, etc., R. W. Co. v. Harrington*, 131 Ind. 426, it is said: "In the absence of some evidence to the contrary, we think the appellee had the right to

presume that the appellant would obey the city ordinance and would not run its trains at a greater rate of speed than four miles an hour at the point where the injury occurred, and while the wrongful conduct of the appellant in this regard would not excuse her from the exercise of reasonable care, yet in determining whether she did use such care her conduct is to be judged in the light of such presumption."

In *Pennsylvania Co. v. Stegemeir*, 118 Ind. 305, where the injured party entered upon the track through an open gate, the court said: "He had no right, however, to recklessly omit to use his senses of sight and hearing, and rely entirely upon this presumption; but he did have a right to presume that there were no approaching trains."

In *Chicago, etc., R. R. Co. v. Boggs*, 101 Ind. 522, 51 Am. Rep. 761, the doctrine is approved that if a railroad company creates an appearance of safety, and a traveler influenced by the appearance, enters upon the track and is injured, he may maintain an action for the injuries. In that case the court said: "We have seen that the traveler has a right to presume that the law will be obeyed, and acting upon this presumption he has a right to assume that the company will not move one train so close upon another as to render of no avail the provisions of the statute."

In *Baltimore, etc., R. W. Co. v. Conoyer*, 149 Ind. 524, the court, by Jordan, J., said: "Counsel seem to ignore the fact that the charge included, not only the sense of hearing, but that of sight as well, and, substantially and in effect, advised the jury that a person approaching a railroad crossing has the right to assume that the company will obey the law, by giving the required signals of an approaching train; and if such person, under the circumstances, after having exercised due care, and employed his senses of seeing

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and hearing, to ascertain if a train is approaching, and thereby avoid danger, can neither see nor hear an advancing or moving train, he is justified in presuming that he can pass over the crossing in safety, This brought the instruction well within the rule asserted by the authorities. See *Pittsburg, etc., R. W. Co. v. Martin*, 82 Ind. 476; *Miller v. Terre Haute, etc., R. W. Co.*, 144 Ind. 323; Elliott on Railroads, section 1158."

Counsel for appellant ask a reversal of the case at bar upon the authority of the *Cincinnati, etc., R. W. Co. v. Howard*, 124 Ind. 280. The two instructions held erroneous in that case were the second and fifth. The court speaking of the second instruction said: "The second instruction could have led the jury to no other conclusion, if the view was in some way obstructed between that part of the highway over which the appellee was approaching the crossing and the railroad, and there had been a failure to sound the whistle attached to the locomotive engine or ring its bell within eighty rods of the crossing, and if she could have crossed in safety had the approaching train been eighty rods away, than that she was not guilty of contributory negligence, even though she drove upon the crossing without stopping to look or listen for an approaching train." In view of this criticism of that instruction, it was clearly unlike the instruction in the case at bar. As to the fifth instruction given in the Howard case, the court said: "By the fifth instruction the jury are told that if the whistle was not sounded nor the bell rung, this was a circumstance tending to show want of contributory negligence, and as a logical sequence (if it were a circumstance in that direction), the jury were told that they might find therefrom that it was sufficient to establish the fact, as it was for them to determine as

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to the weight of the evidence." It would be a strained construction of the language used in the instruction in the case at bar to say that the above language is applicable. Taking all the instructions set out in the Howard case together, and it is evident from what is there said, that the court was expressly denying the theory advanced by counsel that a reliance upon the duty of the railroad company to give the statutory signals would excuse the injured party from the duty to look and listen for an approaching train before going upon the crossing. This is the view of that opinion expressed by the Supreme Court in the case of *Miller v. Terre Haute, etc., R. W. Co.*, 144 Ind. 323. The opinion in the Howard case criticises the case of *Pittsburg, etc., R. W. Co. v. Martin, supra*, and says that it is not in harmony with the earlier cases, and is out of line with the more recent cases, and cannot be regarded as authority. No criticism is made, however, of the case of *Indianapolis, etc., R. W. Co. v. McLin, supra*, which is a much stronger case than the Martin case. In the case of *Miller v. Terre Haute, etc., R. W. Co., supra*, Hackney, J., speaking for the court, expresses doubt as to the entire justice and propriety of the criticism of the Martin case in the Howard case, and says: "We do not understand the Martin case or the Harrington case [131 Ind. 426] to hold that one using a highway at the crossing of a railway may do so without any care for his own safety or the safety of those using the railway, or that he may repose a blind confidence in receiving the warning signals required to be given by locomotive engineers, and pursue his course without looking or listening for the approach of trains. We have no reason to doubt the soundness of the rule in the Harrington case, nor that of the Martin case, so far as it announced the right of the traveler to believe that the railway company

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would obey the law." The doctrine laid down in the Martin case was expressly approved in the case of *Pittsburg, etc., R. W. Co. v. Burton*, 139 Ind. 357. And the rule declared in *Indianapolis, etc., R. R. Co. v. McLin*, *supra*, is followed in *Terre Haute, etc., R. R. Co. v. Brunner*, 128 Ind. 542. See *Chicago, etc., R. R. Co. v. Hedges*, 105 Ind. 398.

In view of the authorities, the question presented by the instruction is not free from difficulty. It is not the purpose to criticise or go contrary to the rulings of the Supreme Court upon the question, but to follow the rules declared by that court. And as that court in a later case, directly criticised the Howard case, and at the same time has approved the doctrine in the Martin case, and has also approved the doctrine of that case in other cases, and as the McLin case has never been overruled, but has been cited with approval, we can but conclude that the instruction given by the trial court is in harmony with and is sustained by the rule as now held by the Supreme Court.

It is settled beyond question in this State that a person who is approaching a railroad crossing, and does not look and listen for an approaching train, but heedlessly attempts to cross the tracks because he hears no signals, is guilty of contributory negligence. The law says the company must give these signals and it also says that the traveler must listen for them. Suppose he is in a place where he cannot see, but where the signals could be heard, and he stops and listens and hears no signals because none are given. His conduct, under such circumstances, must be that of a reasonably prudent man. If the signals were given and he could have heard them, it is held he did hear them, and this fact must be considered in determining the question of his conduct at the time he approached the crossing. The same reasoning,

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equally as sound, concludes that if he listened for signals and heard none, because none were given, that fact should be considered in determining his conduct. "The omission," says the Supreme Court, "is calculated to mislead the traveler, and to assure him that the coming of the train is not imminent." *Chicago, etc., R. R. Co. v. Boggs*, 101 Ind. 526; *Pierce on Railroads*, 350.

It is argued that the court's instruction to the jury on the question of damages is erroneous, for the reason that it left it with the jury to assess damages for a permanent injury when there is no evidence in the record tending to show a permanent injury, and for the further reason that the instruction told the jury they might consider the peril to appellee's life at the time of the accident as an element of damages. There was no direct evidence that the injury is permanent, but there is evidence from which the jury could have concluded that appellee's injuries are of a permanent character. In cases of this kind it is often impossible to say whether the injury will be permanent. The jury were left to say whether the injury is temporary or permanent, and under the evidence they could have concluded either: It was not unreasonable to say, upon the evidence, that appellee's injury would be permanent. See *Ohio, etc., R. W. Co. v. Cosby*, 107 Ind. 32.

As to the second objection to this instruction appellant's counsel admit that "it is true that in *Terre Haute, etc., R. R. Co. v. Brunner*, 128 Ind. 542, a similar instruction seems to have been sustained."

In the case cited, the instruction was objected to because it stated that the jury should "take into account the peril, if any there was, to plaintiff's life." The instruction in that case, as in the case at bar, told the jury that they might assess such damage as would

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fairly compensate the appellee for injuries. As we construe the instruction in question, it is, in effect, identical with that in the case of *Terre Haute, etc., R. R. Co. v. Brunker, supra*. Judgment affirmed.

Henley, C. J., and Wiley, J., dissent.

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[No. 2,596. Filed July 1, 1898.]

COMPLAINT.—Action Against Sheriff.—Payment of Liens out of Order.

—A complaint against a sheriff to recover the surplus remaining from the sale of real estate under a foreclosure proceeding which alleged that plaintiff was the holder of a certificate of purchase of such real estate at a prior foreclosure sale thereof under a junior mortgage, and that such surplus was paid to a judgment creditor whose lien was junior to plaintiff's lien, is not bad for failing to state the name of the owner of the land at the time of the decree of foreclosure of the junior mortgage, or the mortgagor, where it was alleged that certain parties named were defendants in such proceeding, and that plaintiff became the purchaser of the real estate at the sheriff's sale, and which also alleged that plaintiff was a party to the foreclosure of the senior mortgage, and that it was therein decreed that plaintiff held the next oldest lien on the real estate. *pp. 590-592.*

LIENS.—Priority.—Satisfaction.—Sheriffs.—Where the writ under which a sheriff made a sale of real estate contained notice that plaintiff's lien was second to that of the person for whom the sale was made, it was the duty of the sheriff to apply the surplus arising from the sale to the satisfaction of such lien without demand. *pp. 592, 593.*

SHERIFFS.—Foreclosure Sales.—Misapplication of Surplus.—Where the writ under which a sheriff's sale of real estate was made stated the name of the person holding the next oldest lien, the sheriff is liable on his official bond for the application of a surplus arising from such sale to another judgment lien junior to that of the person named in the writ. *pp. 593, 594.*

From the Tipton Circuit Court. *Affirmed.*

Waugh, Kemp & Waugh, for appellants.

Gifford & Coleman, for appellees.

COMSTOCK, J.—Suit on sheriff's bond. Appellants severally demurred to the complaint, which demur-

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rers the court overruled, and appellants refusing to plead further, judgment was rendered against them on demurrer.

The only question presented by this appeal under the assignment of errors is the sufficiency of the complaint. The complaint, in substance, alleges that at the dates mentioned therein, appellant White was the duly elected, qualified and acting sheriff of Tipton county, Indiana, and that his co-appellants were sureties on his official bond, which bond was in the usual statutory form; that on the 26th day of May, 1894, one John B. Reider obtained a decree of foreclosure of a mortgage executed August 23, 1893, in the Tipton Circuit Court, on the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 31, township 23 N., range 5 E., in said county, in a certain action wherein said Reider was plaintiff and Eli W. Cloverdale and Mary M. Cloverdale, his wife, were mortgagor defendants. On the 26th day of August, 1895, plaintiff purchased said real estate at the sale by said sheriff, under said foreclosure, for the full amount of the principal, interest, and costs, paying therefor \$707.00, receiving from the sheriff a certificate of purchase; that on the 7th day of March, 1896, Robert, William, and John Pickens and Abraham Kemp obtained a judgment and foreclosure against said lands in the sum of \$825.00 in said Tipton Circuit Court on a mortgage executed by said Cloverdale and wife to one Anna Openheimer, December 29, 1890. Plaintiffs were parties defendants to the foreclosure proceedings of Pickens *et al.* of said Openheimer mortgage, which had been sold and assigned to said Pickens *et al.* prior to said foreclosure, and in the decision rendered in said cause it was decreed that the claim of said plaintiffs was in the form of a sheriff's certificate, and the right of redemption decreed within the year as against the decree in favor of said

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Pickens *et al.*, which was for the sum of \$823.66 and costs. Afterward, to wit, on the 16th day of May, 1896, said real estate was sold to satisfy the judgment and decree in favor of said Pickens *et al.* against Cloverdale *et al.*, by said sheriff, said Kemp being the purchaser for \$1,163.34. At the date of the last sale referred to, said Pickens *et al.* had caused to be issued and placed in the hands of the said sheriff an execution on a personal judgment recovered December 14, 1893, in favor of said Robert, William, and John Pickens and Abraham Kemp against said Cloverdale. After the payment of the judgment on the Openheimer mortgage, there remained in the hands of said sheriff, derived from said sale, the sum of \$300.00, which said sheriff applied to the satisfaction of the execution issued on the personal judgment in favor of Pickens *et al.* against said Cloverdale, and refused to apply the same upon their claim by virtue of the certificate of purchase. Plaintiffs further averred that the said land had never been redeemed from their purchase of the same on the said Reider foreclosure, and that on the said 26th day of May, 1896, plaintiffs presented the said certificate of purchase to the sheriff of said county and received from him a deed of conveyance to the said land; that they took possession immediately thereafter and still remain in the possession of the same; that said sheriff issued to said Kemp a certificate of purchase, and that plaintiffs, in order to protect their rights, will be compelled to redeem from said sale, paying said Kemp the full amount of his bid, together with 7 per cent. interest from the date of purchase; that there had been a breach of the conditions of said bond in the failure of the sheriff to pay the plaintiffs the sum of \$300.00 in his hands as sheriff, which these plaintiffs were entitled to by reason of holding the next oldest lien upon

the real estate described in the plaintiff's complaint to the one upon which the said \$300.00 was redeemed.

Appellants' learned counsel insist that the law does not require the sheriff to pay over said surplus to appellees upon the grounds assigned as a breach of the bond, and that a liability upon any other ground would not avail appellees. The latter part of the proposition is of course correct. Appellants' counsel claim that the complaint is bad because it does not state who was the owner of the land when Reider obtained his decree of foreclosure, nor who executed the mortgage, nor that a decree was issued on said judgment. The complaint states that said Cloverdale and wife were parties to the foreclosure, and that plaintiff's (appellees) became purchasers of said real estate at sheriff's sale, etc. The complaint alleges, too, as above set forth, that appellees were parties to the proceedings in which the Openheimer mortgage was foreclosed and that the court, in the order made therein, decreed that they held the next oldest lien on said real estate, evidenced by the certificate of said sheriff, and that they had the right to redeem within the year. These averments were sufficient without setting out all the steps by which that lien was acquired. The right to, and priority of, liens are the matters in controversy.

It is further contended that the complaint is insufficient because it does not aver that said sheriff was notified that appellees had a lien on the land to the payment of which they claim the said excess should have been applied, nor that any demand was made upon him for the money; that without said notice it was the duty of the sheriff to apply said surplus to the payment of the junior execution in his hands at the time of the sale. Citing section 774, Burns' R. S. 1894 (762, Horner's R. S. 1897). The writ under which

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he made the sale contained notice of appellees' rights as lien holder. These rights had been adjudicated, of which rights the writ informed the sheriff. It was his duty to apply the money realized from the sale upon the proper writ.

The objections, which we have been considering, to the complaint, we regard as technical rather than meritorious. The controlling question presented by the appeal is contained in the proposition of appellants counsel that the law did not require the sheriff to pay over said surplus to appellees. In *Clapp v. Hadley*, 141 Ind. 28, a party held two mortgages of different dates on the same land, given by the same person, and foreclosed them on the same day, in the same court, neither decree containing any reference to the other. He caused the land to be sold on the decree foreclosing the junior mortgage, purchased it himself, paid the costs and receipted in full for the amount of the decree. A few days later he caused the same land to be sold on the decree foreclosing the senior mortgage, bought in the land, but the amount of his bid exceeded the amount due him on the decree. The mortgagor claimed the surplus. The court held that the mortgagee was entitled to the surplus in an amount equal to the amount of the decree on the junior mortgage. In the course of the opinion the court says, page 30: "In the recent and well considered case of *Robertson v. Van Cleave*, 129 Ind. 217, it was held that the holder of a certificate of purchase under a junior lien was not an owner, but that he was a lienor with the judgment, under which he purchased as the basis of his lien. See, also, *Jewitt v. Tomlinson*, 137 Ind. 326. We conclude, therefore, that appellant's junior lien was not extinguished, as against the appellee, though it was required to surrender priority

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to the senior decree and purchase. * * * If there had been other and still younger liens, their holders could not, in good conscience, have asked to supersede the appellant's junior lien in the distribution of the surplus arising from the sale under the senior lien." See, also, *Hart v. Wingart*, 83 Ill. 282; *West v. Shryer*, 29 Ind. 624.

We think the foregoing case decisive of the question before us. The sheriff misapplied the money in question by paying to one not entitled thereto. The money should have been applied to the next oldest lien. His writ, informing him of the lien of appellees, no demand from them was necessary before the commencing of the suit, he having already, in violation of his official duty, made a wrong application of the money. See, also, *State, ex rel., v. Clapp*, upon second appeal, 147 Ind. 244. Judgment affirmed.

LOUISVILLE-CINCINNATI PACKET COMPANY v. ROGERS.

[No. 2,361. Filed March 18, 1898. Rehearing denied July 1, 1898.]

SHIPPING.—Carriers.—Bill of Lading.—Customs and Usages.—Contracts.—Evidence of the custom and usage of trade is admissible in mercantile contracts for the purpose of showing the particular sense in which certain words used are intended, but such evidence cannot control or vary the positive stipulations in a bill of lading. pp. 598, 599.

SAME.—Carriers.—Contracts.—Deviation.—Where a consignor of goods contracted with the carrier to ship same on a certain named boat, and the carrier shipped the goods on another and different boat for the reason that the boat named was not then in port, such deviation constituted a violation of the contract, and the carrier cannot avail himself of a provision of the contract exempting him from liability for the loss of the goods by fire. pp. 598-602.

SAME.—Bill of Lading.—Deviation.—Loss of Goods.—An averment in an answer to a complaint against a carrier for the value of certain goods destroyed by fire while being shipped in another and different boat from that specified in the bill of lading, that the goods would have been destroyed if left in the wharf-boat to await the arrival in port of the boat to which the goods were consigned, as

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that part of the wharf-boat in which the goods would have been stored was also destroyed by fire, is a conclusion. p. 602.

SHIPPING.—*Delivery of Goods.—Rescission of Contract.—Pleading.*—

The delivery of goods by the consignor thereof at the wharf-boat of a packet line to a clerk of another and different boat from that named in the bill of lading would not constitute a rescission of a clause of the contract providing for shipment in a certain boat, where it was not shown that the clerk who received the goods was not the agent of the packet company to receive goods for the boat named in the bill of lading. p. 603.

SAME.—*Delivery of Goods.—Waiver of Condition in Bill of Lading.*—

The delivery of goods by consignor's agent to a boat belonging to a packet company other than that named in the bill of lading would not of itself constitute a waiver of the condition in the bill of lading that the goods were to be shipped by a certain boat therein named. pp. 603, 604.

From the Jefferson Circuit Court. *Affirmed.*

Smith & Korbly and *W. O. Ford*, for appellant.

Simeon E. Leland, for appellee.

COMSTOCK, J.—This was an action by appellee, plaintiff below, against the appellant, upon a bill of lading, to recover the price of goods destroyed whilst in the hands of appellant as a common carrier. The complaint was in two paragraphs. The first paragraph, in substance, alleged that plaintiff's consignor delivered 1200 pounds of white lead to defendant at Cincinnati, to be carried to Madison; that a bill of lading was issued therefor; and that defendant failed and refused to deliver the white lead. The second paragraph, in substance, alleged delivery of the white lead to defendant at Cincinnati, by plaintiff's consignor; the issuance of a bill of lading therefor, which was conditioned for carriage to Madison on the steamboat *Sherley*, and excepted liability for loss from fire; but that the white lead was transferred to the steamboat *Carrollton*, whereby it was destroyed by the burning of that boat.

The defendant answered in four paragraphs. The

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first paragraph, a general denial, was withdrawn. The second paragraph of answer, in substance, alleged that on the day the loss complained of happened, and for a long time prior thereto, the defendant was, and had been, a corporation owning and operating a line of steamboats from the city of Cincinnati, Ohio, to the city of Madison, Indiana; that among the boats so owned and operated by said defendant on said day were the steamboats Sherley and Carrollton, and said boats were on said day engaged in the packet trade between said cities of Cincinnati and Madison, and leaving said city of Cincinnati for said city of Madison on alternate days, Sundays excepted; that on said day and for more than fifty years prior thereto, defendant and its predecessors kept and maintained a wharf-boat at Cincinnati; that it was the usage and custom of said defendant and its predecessors, during all that time, to receive and hold freight at said wharf-boat, not for any particular boat, but for the first boat to leave port for the destination of the freight received; that on said day when the white lead was delivered to defendant for carriage, together with a bill of lading for the steamboat Sherley, said steamboat was not in port, but was down the river on a trip; but that the steamboat Carrollton was in the port of Cincinnati on said day, taking freight for Madison, for which place it was to clear at 5 o'clock that day. That in accordance with said usage and custom, which was particularly well known to the shippers of Cincinnati, said white lead was placed on board the steamer Carrollton. That said boat, together with all its contents, were destroyed by fire whilst moored at the Cincinnati wharf-boat, without fault or negligence of defendant. The said second paragraph of answer contained also the following allegation, to wit: "And defendant further alleges that, if defendant had held

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said goods over from the 5th day of August, 1895, until the next following trip of the steamer Sherley, on the — day of August, 1895, the said goods would have been destroyed by the accidental fire which destroyed the steamer Carrollton, because the said accidental fire also, at the same time, consumed and destroyed the end of the wharf-boat upon which said goods would have been stored, together with its contents." The third paragraph of answer, in part, alleged that: The plaintiff, by his agent, delivered the goods at defendant's wharf-boat, to Brashear, clerk of the steamer Carrollton, with a bill of lading for said goods, in which bill of lading was inserted "Steamer Sherley, Aug. 5, 1895." That said plaintiff's agent, who delivered said goods at said wharf-boat to said Brashear, well knew that he was the clerk of the steamer Carrollton, and well knew that the 5th day of August was her day in port, and that she was then moored at said wharf-boat, loading for Madison and way-landings, and leaving said port at 5 p. m. of said day, and that she was the only packet in said line leaving said port on that day for Madison. The fourth paragraph of answer alleged, in substance, that plaintiff's consignor delivered said goods to the steamer Carrollton with a bill of lading for the same, in which bill of lading was inserted, "Steamer Sherley, August 5, 1895." Demurrers to the second, third and fourth paragraphs of answer were sustained, whereupon defendant withdrew the plea of general denial, and judgment was given for plaintiff. Defendant properly reserved exceptions.

The rulings of the lower court, sustaining the several demurrers to the second, third, and fourth paragraphs of the answer, are assigned as error. Counsel for appellant in their able brief argue and contend for four propositions of law: First, "the custom and

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usage of trade alleged, that goods were never received by defendant for any particular boat, but for the first boat to leave port, is such a custom as to modify the contract or bill of lading as to the particular conveyance to be used." Second, "The fact alleged that if the deviation had not occurred, the goods would have been destroyed by the same fire, notwithstanding, relieves defendant of liability as an insurer." Third, "The delivery by plaintiff's agent of the goods to Brashear, clerk of the steamer Carrollton, with a bill of lading, filled out by plaintiff's agent, in which was inserted the name of the steamer Sherley, was a rescission of that clause of the contract providing for carriage on the Sherley, and the making of a new contract to carry the goods on the Carrollton." Fourth, "The delivery of the goods by plaintiff's agent to the steamer Carrollton itself, with a bill of lading conditioned for the shipment of said goods on the steam boat Sherley, was a waiver of said condition on the part of plaintiff."

The execution of the bill of lading, made a part of the complaint, is admitted. Different definitions of the commercial instrument so called have been given by different courts, and jurists. As restricted to transportation by water, a bill of lading may be said to be a written acknowledgment, signed by the master of a vessel, that he has received the goods therein described from the shipper, to be transported on the terms therein expressed, to a described place or destination, and there to be delivered to the consignee or the parties therein designated. 4 Am. and Eng. Enc. of Law 509. By the terms of the contract under which appellants received the goods, it was agreed to transport them on the steamer Sherley. Evidence of the usage and custom of trade is admissible in mercantile contracts to prove that the words in which they are ex-

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pressed in a particular trade to which the contract refers are used in a particular sense, and different from the sense that they ordinarily import, and in certain cases, for the purpose of annexing incidents to the contract in matters upon which the contract is silent; but it is never admitted to make a contract or to add a new element to the terms of the contract previously made by the parties. Usage may be admitted to explain what is ambiguous, but not to vary a contract which is plain. It can not control or vary the positive stipulations of the bill of lading. *The Delaware*, 14 Wall. 579; *Boon & Co. v. Steamboat Belfast*, 40 Ala. 184, and authorities there cited; *Benson v. Gray*, 154 Mass. 391, 28 N. E. 275.

In *Green, etc., Navigation Co. v. Marshall*, 48 Ind. 596, certain goods were shipped on the steamer *Evansville*, at Calhoun, Kentucky, to be delivered at Anderson Landing, in Tennessee. In answer to an action for the loss of goods, the defendant admits making the bill of lading; that she brought the goods to Evansville, Indiana, said steamer being employed in running between the city of Evansville, Indiana, and Bowling Green, Kentucky, and never going further down the Ohio river than Evansville, which was well known to the plaintiff at the time he shipped the goods, and plaintiff well knowing that said goods would be re-shipped at Evansville upon some other boat, to be carried to their destination. That the goods were re-shipped on board the staunch steamer *Norman*, to Anderson Landing in Tennessee; that she proceeded on her voyage, but, upon reaching her destination, was unable to find a consignee, and returned with said goods to Evansville, Indiana, and deposited them upon the wharf-boat until such time as the owner could be communicated with, and while there, the goods were destroyed by fire without the fault or negligence of

the defendant. To which answer a demurrer was sustained. The court says, page 598, "The appellant had no right to reship the goods on the steamer Norman without actual necessity required it. When a reshipment of goods is made by a common carrier without authority, and the goods are afterwards lost, even by the act of the state's enemies, he will not be excused from liability. * * * Neither the custom or usage of trade nor parol evidence will be allowed to vary a bill of lading in this respect. *Trott v. Wood*, 1 Gallis 443, and *May v. Babcock*, 4 Ohio, 334. And where reshipment is stipulated for in the bill of lading, it will not relax the liability of the common carrier for the non-delivery of the goods. *Little v. Semple*, 8 Mo. 99, and *Cassilay v. Young*, 4 B. Mon. 265. * * * And as the reshipment will not excuse the first carrier from liability, we are of the opinion that the second paragraph of the appellant's answer is insufficient. * * * Judgment affirmed."

The case of *Cox v. Foscue*, 37 Ala. 505, reported in 79 Am. Dec. 69, was an action by the appellee against the appellants as common carriers, to recover for the loss of two bales of cotton, shipped by plaintiff on board of defendants' steamboat *Eliza Battle* and never delivered at the port of destination. Defendants pleaded that the cotton was lost by "dangers of the river and by fire," within the meaning of an exception in the bill of lading. The *Eliza Battle*, on her voyage down the river, ran aground, and, in order to lighten her, plaintiff's cotton was put on another of defendants' boats. The *Eliza Battle*, after being thus lightened, continued down the river without taking back any part of her cargo. The boat to which the cotton was removed afterwards ran aground, and was lightened in like manner by transferring a part of her cargo to a third boat of defendants. This third boat

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including plaintiff's cotton was afterwards destroyed by accidental fire. Each of the boats had competent officers and sufficient crew, and neither was overloaded. The cotton from the Eliza Battle could have been landed on the bank by putting out planks from the boat. The court, by A. J. Walker, C. J., says: "The contract of affreightment obliges the carrier, in the absence of a legal excuse, to carry the freight to the destined port in the very vessel stipulated in the bill of lading. It is a right resulting from the contract, that the transportation shall be in the chosen vessel. It is not permissible to speculate as to the reasonableness of the choice. The owner of the freight cannot be questioned as to his reasons. [Citing authorities.] A trans-shipment of the freight, without a legal excuse, however competent and safe the vessel into which the transfer is made, is a violation of the contract, an infringement of the rights of the freighter, and subjects the carrier to liability if the freight be lost. The trans-shipment, therefore, of the plaintiff's cotton, of itself rendered the carrier liable for the subsequent loss of the cotton, unless the act of trans-shipment was legally proper or excusable. * * * 'The master, in short, is, in such cases, to act reasonably and honestly, with a view to save the property and perform the voyage.' The mere stranding, of itself, does not necessarily produce a necessity for trans-shipment. Notwithstanding the stranding, it is the master's duty to get the vessel off, and prosecute the voyage, if he can do so; and no consideration of mere *convenience to him* would justify a *trans-shipment*, etc. Judgment affirmed."

The parties having agreed to ship on the steamer Sherley, they made their contract contrary to the alleged custom. Said steamer not being in port that day, appellant might have refused to receive them.

Not having exercised that right of refusal, it cannot now be heard to say that it did not receive them for shipment in said boat. *Hannibal R. R. Co. v. Swift*, 12 Wall. 262. The reception of the goods upon the steamer Carrollton, not from necessity, but from convenience, was a violation of the contract. It undertook to forward them upon a conveyance different from the one expressly agreed upon, and thus became an insurer of the goods, and cannot avail itself of the exception made in its behalf in the contract. *Robinson v. Despatch Trans. Co.*, 45 Ia. 470; *Galveston R. W. Co. v. Allison*, 59 Tex. 193; *Fatman v. Cincinnati R. R. Co.*, 2 Disney 248. The act of placing said goods on the steamer Carrollton without authority and without necessity was equivalent to a reshipment. *Green, etc., Navigation Co. v. Marshall*, *supra*. The fact that the Carrollton left the port of Cincinnati on the day the goods were received, did not justify the placing of them upon that boat, for appellee had specifically contracted for their transportation on the Sherley. He could not complain if the goods were not delivered upon another boat.

The averment that the goods would have been destroyed if left on the wharf-boat because that part of the wharf-boat where they would have been stored was destroyed by the same fire that destroyed the steamer Carrollton, is a conclusion and does not make the averment good. It states no fact showing a necessity for storing them in that part of the boat, nor any facts to show that they might not have been removed before reached by the fire. A deviation from the voyage renders the carrier responsible for all losses even from unavoidable casualty; for under such circumstances the loss is traced back through all the intermediate causes to the departure from duty. *Crosby v. Fitch*, 12 Conn. 410; *Hand v. Baynes*, 4 Whart. 204;

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Powers v. Davenport, 7 Blackf. 497, 43 Am. Dec. 100; Story on Bailments, section 509; *Maghee v. Camden, etc., Co.*, 45 N. Y. 514; *Hastings v. Pepper*, 11 Pick. 41.

The third proposition for which appellant's counsel contend, is that the delivery by plaintiff's agent of the goods to Brashear, clerk of the steamer Carrollton, with a bill of lading filled out by appellee's agent in which was inserted the name of the steamer Sherley, was a rescission of that clause of the contract providing for carriage by the Sherley and the making of a new contract for carriage by the Carrollton. There is no averment in this paragraph that Brashear was not the agent of the defendant company to receive goods for the steamer Sherley. It does not meet the allegations of the complaint that the goods were received by the clerk of the defendant company to be carried by the steamer Sherley. It should have contained these averments. The answer was defective upon this if not upon other grounds.

The fourth paragraph of answer presents the question of waiver, involved in the fourth proposition laid down by appellee's counsel. This paragraph contains the averment that appellee's agent delivered the goods to the steamer Carrollton with a bill of lading conditioned for their shipment on the steamer Sherley. Counsel for appellant contends that by this act of appellee's agent, the condition of carriage by the steamer Sherley was waived. It is also alleged in said paragraph that appellee instructed his agent at Cincinnati to ship the lead by the Sherley; that said agent delivered it with a bill of lading for said steamer to the Carrollton. It avers that the steamer Carrollton received it and placed it on board of said steamer Carrollton—received said bill of lading, made a copy of the same and delivered said copy to plaintiff's agent. It thus appears from this paragraph that

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with this knowledge, without any mistake, appellant company agreed to transport the goods by one vessel and received and placed them upon another. It does not deny that the defendant company "by its clerks, agent," etc., as alleged in the complaint executed their contract in writing to carry said lead on the steamer Sherley. It substantially admits the averments of the complaint. The facts set out fail to show a waiver or estoppel. To hold this paragraph good, would be to disregard the rule that a written contract may be waived by parol evidence.

The demurrer was properly sustained. While reported cases differ as to what facts under given circumstances constitute a deviation, the rule, we think, must be accepted as established by the great weight of authorities that the written contract for carriage is not subject to modification or variance by the custom or usage of trade. We cite as instructive upon this proposition, in addition to cases heretofore referred to, *Van Camp Packing Co. v. Hartman*, 126 Ind. 177; *Scott v. Hartley*, 126 Ind. 239; *Brown v. Foster*, 113 Mass. 136.

We would not be understood as deciding that a shipper not prejudiced by a deviation would be entitled to recover for such deviation. If in the case before us it should appear that the loss must certainly have occurred from the same cause without fault of defendant corporation if there had been no deviation from the contract, then the carrier should be excused. The burden of proving this fact would be upon the carrier. In reference to this defense which is attempted to be set up, we simply hold that the allegations do not make this showing; that the allegations amount only to a conclusion, and do not state facts from which the court can determine that the result would certainly have been the same. There is no error. Affirmed.

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INDIANA, ILLINOIS AND IOWA RAILWAY COMPANY
v. DOREMEYER.

[No. 2,498. Filed May 18, 1898. Rehearing denied July 1, 1898.]

PRACTICE.—*Exceptions to Conclusions of Law.*—*Special Finding.*—

Exceptions to the conclusions of law upon the special finding of facts admit the truth of the facts found. *p. 611.*

CARRIERS.—*Seizure of Goods Under Legal Process.*—Where goods received by a common carrier and placed in a car for shipment were seized by an officer by virtue of a legal process issued in an action in attachment, without any fault or connivance on the part of the carrier, the carrier is not liable for its failure to deliver the goods entrusted to its care. *pp. 605-614.*

From the Lake Circuit Court. *Reversed.*

T. S. Fancher, for appellant.

Willis C. McMahan, for appellee.

HENLEY, J.—This action was commenced by the appellee against the appellant as a common carrier for damages sustained by the appellee on account of the failure of the appellant to transport safely and deliver certain household goods and wearing apparel the property of the appellee. The complaint is in substance as follows: That on the 28th day of November, 1896, the defendant (the appellant), was a common carrier of goods for hire from Dwight, Illinois, to Lowell, Indiana, and on said day at Dwight, Illinois, by its agent, then and there in writing agreed, in consideration of the sum of \$4.45 then and there to be paid by appellee to said agent, to carry safely and promptly for appellee and to deliver to her at Lowell, Indiana, certain household goods and clothing, a copy of which said agreement is filed with the complaint and made a part thereof, and that the plaintiff then and there delivered to the appellant for that purpose the certain goods aforesaid; that appellant did not safely carry and deliver said goods as aforesaid, but

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failed to do so, by which reason the appellee was deprived of the use of any of said goods for a long time, to wit, more than thirty days, and whereby certain of said goods and clothing so owned by appellee, and described in the bill of particulars filed with and made a part of the complaint were wholly lost, and that she was put to great inconvenience in her living and comfort and damaged in the sum of \$200.00.

To this complaint appellant answered in two paragraphs. The first paragraph was a general denial. The second paragraph of answer admits that on or about the middle of September, 1896, appellee's husband shipped his household goods, furniture and wearing apparel from the State of Indiana, to the town of Dwight, state of Illinois, and that on or about the 26th day of November, 1896, the appellee's husband caused said goods to be reshipped from said town of Dwight to Lowell, Indiana, over appellant's road, but appellant says that shortly after said goods were delivered at appellant's freight depot at Dwight, and after the same had been loaded into the car, a creditor of appellee's husband caused said property to be attached in said town by a writ duly issued by a duly authorized court of said state. A copy of the complaint, affidavit, bond, notice, and writ is attached to and made a part of the answer, together with a certified copy of the judgment in said court. It is further averred that the officer so serving said writ took possession of all of said property, and kept and retained possession thereof, and prevented the appellant from shipping said goods, as appellant otherwise would have done had said writ not been served and said goods attached. It is further averred that the appellant could not ship said goods because the officer having full control of said goods refused to permit the defendant to ship the same to said appellee, and that as

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soon as said goods were attached and taken into the custody of said officer, appellant notified the appellee and her husband that said property had been so attached and fully informed said appellee and her husband of the nature of said process by which shipment of said goods was prevented, and that, if appellee sustained any injury or damage to herself or goods, it was while they were in the custody of the officer and while attached at Dwight, Illinois. Appellant further avers that when said goods were delivered at appellant's freight depot, in the town of Dwight, that said goods were duly consigned to the appellee, and a bill of lading duly issued by it to the consignee, the appellee herein, and that said goods were detained at the said town of Dwight without any fault or negligence on the part of this appellant or by any of its agents, servants, or employes, and that as soon as said property so attached was released, this appellant shipped said goods to the consignee, the appellee herein.

The appellee replied to the second paragraph of appellant's answer denying each and every material allegation therein set forth. Upon the issues thus formed there was a trial by the court, and at the request of appellant, the court made a special finding of facts which was in the following words: "The court having been requested by both the plaintiff and defendant in the above entitled cause to make a special finding herein, together with its conclusions of law thereon, finds the facts as follows: That plaintiff commenced this action to recover from the defendant, by way of damages for loss of certain goods described in a bill of particulars filed with her complaint, which goods were to be shipped by her husband for her from Dwight, in the state of Illinois, over the defendant's railroad to Lowell, Indiana; that

said goods were delivered at the office of the defendant in the town of Dwight, and a bill of lading issued by the defendant's agent to Mrs. N. E. Doremeyer, the plaintiff, to be shipped to her at Lowell, Indiana; that said bill of lading was issued on the 28th day of November, 1896; that on receipt of the said goods by the defendant, the same were immediately placed in one of defendant's cars, to be shipped to their destination as required by said bill of lading; that on the 29th day of November, 1896, while said goods were in the defendant's car at Dwight, one Thomas Jenkins, a constable of said town of Dwight, caused said goods to be attached by virtue of a writ of attachment duly issued from a justice court in an action begun by one Jane Burhan against Frank Doremeyer, the husband of the plaintiff herein; that immediately before the levy, the officer armed with said writ, but which he did not exhibit, asked defendant's said agent if he had any goods in his possession belonging to Doremeyer; that in response thereto the agent answered that he had, and stated that the goods were then in the car; that without anything further transpiring, and without objection upon the part of the agent, the officer seized and levied on said goods. The court further finds that the plaintiff's husband shipped a lot of household goods to Dwight, Illinois, from Lowell, Indiana, during the month of September, 1896; that said goods were billed from Lowell to Dwight in September, 1896; that said Frank Doremeyer was then the consignee and consignor of said household goods; that when he delivered the goods to the agent at Dwight, in November, 1896, to be reshipped to Lowell, Indiana, he informed the agent that they were the same household goods that he shipped there from Lowell, Indiana, in September of the same year, and claimed that they were shipped there from Lowell to

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Dwight at much less expense than the agent was then demanding that he now pay to return them to Lowell, Indiana; that at the time of the consignment by plaintiff, as aforesaid, and ever since, the goods so consigned were the sole and exclusive property of plaintiff; that the officer attached the said household goods and removed them from defendant's car and stored them in defendant's freight office, and from that time said constable exercised complete control over them, until a portion of them were re-billed on the 21st of December, 1896; that the officer had stored said goods in the freight building, and while he had them in his custody and under his control by virtue of the attachment or writ, the building in which they were stored was burglarized on the evening of the 10th day of December, 1896; that the boxes and barrels in which they were stored were broken open and a portion of the goods stolen therefrom; that said goods at the time they were stolen, were in the custody and under the control of the said constable, by virtue of the writ in attachment. The court further finds that when said goods were delivered to defendant by Frank Doremeyer for shipment to Lowell, Indiana, he claimed to be acting as the agent of the plaintiff; that as soon as said goods had been delivered to defendant for shipment, the plaintiff, with her husband, took a train for Chicago; that said goods were attached by said constable the following day, and after said plaintiff and her husband had left said town of Dwight; that said plaintiff was informed by defendant on the 3rd day of December, 1896, and after she reached Lowell, Indiana, and had taken up her residence there, that said goods had been attached and was then in the custody of an officer, by virtue of a writ in attachment duly issued by a justice of the peace in

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which the plaintiff in said attachment suit claimed that Frank Doremeyer owed her \$19.00 for milk and house rent; that the said defendant herein requested the said Doremeyers to deposit the amount of said claim with the agent at Lowell, Indiana, and the goods would be released and forwarded at once to them; that the plaintiff and her husband informed this defendant that said goods were not those of the said Frank Doremeyer, but were those of his wife, and they refused to deposit said money or pay said claim or do anything to secure the release of the household goods, but permitted them to remain in the freight office in the custody of said constable for several days thereafter, and until the burglary occurred, and until the day of trial, to wit, the 21st day of December, 1896, when said plaintiff herein and her husband filed in said justice court at Dwight, Illinois, a verified schedule, claiming the property as belonging to them both, and the court finds that the said property was then and there released from said attachment proceedings, and, except as to that portion of it which had been stolen, re-billed by the defendant herein and transported to plaintiff, at Lowell, Indiana; that the goods so stolen were wholly lost to the plaintiff and that the goods so stolen were of the fair cash value, at the time of taking by thieves, and at the time they should have been delivered at Lowell, Indiana, had not said levy been made, of \$76; that at the time of the receipt of said goods by defendant, it was a common carrier for hire, and received them as such, and that the defendant's charges therefor were wholly prepaid; that the bill of lading executed by defendant to plaintiff was in the words and figures set out in the exhibit to the complaint." On the special finding of facts as above, the court stated its conclusions

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of law to be that appellee is entitled to recover from the appellant the sum of \$76.00.

The only error argued by appellant, and which is presented by the record in this cause, is that the court erred in its conclusions of law on the special findings. Appellant having excepted to the conclusions of law upon the special finding of facts admits the truth of the facts as found by the court. We believe it to be the settled law in this State that a seizure under legal process will excuse the common carrier from delivering goods entrusted to his care for shipment. *Ohio, etc., R. W. Co. v. Yohe*, 51 Ind. 181, 19 Am. Rep. 727. The case last cited covers every point in controversy in this cause, and while the facts are somewhat different in the two cases, the governing principle of law is the same in both cases.

In the case of *Stiles v. Davis*, 1 Black (U. S.) 101, the goods were seized by a sheriff under a writ of attachment against a third party, and taken from the carrier, and the action was brought by the consignee upon the bill of lading, as in this case. In the opinion the Supreme Court of the United States say: "After the seizure of the goods by the sheriff, under the attachment, they were in the custody of the law, and the defendant could not comply with the demand of the plaintiffs without a breach of it, even admitting the goods to have been, at the time, in his actual possession. The case, however, shows that they were in the possession of the sheriff's officer or agent, and continued there until disposed of under the judgment upon the attachment. It is true, that these goods had been delivered to the defendant, as carriers, by the plaintiffs, to be conveyed by them to the place of destination, and were seized under an attachment against third persons; but this circumstance did not impair the legal effect of the seizure or custody of the

goods under it, so as to justify the defendant in taking them out of the hands of the sheriff. The right of the sheriff to hold them was a question of law, to be determined by the proper legal proceedings, and not at the will of the defendant, nor that of the plaintiffs. The law on this subject is well settled, as may be seen on a reference to the cases collected in sections 453, 290, 350 of Drake on Attachments, second edition."

It was said by Downey, J., in delivering the opinion of the Supreme Court of Indiana, in the case of *Ohio, etc., R. W. Co. v. Yohe*, *supra*, "The question presented is this, is a common carrier of goods excused from liability for not carrying and delivering the goods, when they are, without any act, fault, or connivance on his part, seized, by virtue of legal process, and taken out of his possession? It is impossible for the carrier to deliver the goods to the consignee, when they have been seized by legal process and taken out of his possession. The carrier cannot stop, when goods are offered him for carriage, to investigate the question as to their ownership. Nor do we think he is bound, when the goods are so taken out of his possession, to follow them up, and be at the trouble and expense of asserting the claim thereto of the party to or for whom he undertook to carry them. We do not think it material what the form of the process may be. In every case the carrier must yield to the authority of legal process. After the seizure of the goods by the officers, by virtue of the process, they are in the custody of the law, and the carrier cannot comply with his contract without a resistance of the process and a violation of the law. The right of the sheriff to hold the goods involved questions which could only be determined by the tribunal which issued the process or some other competent tribunal, and the carrier had no power to decide them. If the goods were wrong-

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fully seized, the plaintiffs had their remedy against the officer who seized them, or against the party at whose instance it was done. As between these parties, the process would be no justification, if the plaintiffs were the owners and entitled to the possession of the goods. It makes no difference, we think, that the process was issued by a tribunal of a state different from that in which plaintiffs reside. The rule must be the same as in a case where the process emanates from a court in the state of the plaintiff's residence. It cannot be denied that the carrier must obey the laws of the several states in which it follows its calling. The laws of Illinois which give force and effect to a writ of replevin must be obeyed. It cannot say to the sheriff, who is armed with a writ issued in due form of law, commanding him to take the property, that it has executed a bill of lading, and thereby agreed to transport the property to another state, and therefore he cannot have it. The sheriff would have the right, and it would become his duty, to call out the power of the county to aid in serving his lawful process. The carrier is deprived of the possession of the property by a superior power—the power of the state—the *vis major* of the civil law, and in all things as potent and empowering, as far as the carrier is concerned, as if it were the 'act of God or the public enemy.' In fact it amounts to the same thing; the carrier is equally powerless in the grasp of either."

In the case at bar it is found by the court that on the 29th day of November, 1896, while the said appellee's goods were in appellant's care, ready for shipment, they were attached, seized and levied upon by virtue of a writ of attachment duly issued from a justice's court, and that from the time they were thus seized by the constable up to the time the goods were reshipped and including the time in which a part of

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the goods were stolen, they were under the care and control of the said officer of the court, that appellee on the 3rd day of December, 1896, which was the fourth day following the attachment of the goods, received notice from the appellant at Lowell, Indiana, the place to which she had removed, that the goods were attached, and were in the custody of the officer. It does not appear from the special finding that the goods of appellee were so seized by virtue of legal process by reason of any act, fault, or connivance of the appellant, and the case comes squarely within the rules of law laid down by our Supreme Court in *Ohio, etc., R. W. Co. v. Yohe, supra*.

The lower court erred in its conclusions of law upon the special finding of facts. The cause is for such reason reversed, with instructions to the lower court to restate its conclusions of law and render judgment in favor of appellant.

Comstock and Black, JJ., absent.

SWIFT, ADMINISTRATOR, v. HARLEY ET AL.

[No. 2,055. Filed March 30, 1898. Rehearing denied Oct. 4, 1898.]

SPECIAL FINDING.—Executors and Administrators.—Exceptions to Report.—Practice.—The trial court may make a special finding of facts and state its conclusions of law thereon, as provided by section 551, Horner's R. S. 1897, in the trial of exceptions to an administrator's report. *pp. 616, 617.*

SAME.—Objections. —When Made for First Time on Appeal.—Appeal and Error.—Where no objections were interposed by the complaining party in the court below to the court making a special finding of the facts he will not be heard to complain of same on appeal. *p. 617.*

PRACTICE.—Venire De Novo.—A *venire de novo* should be granted where a verdict or finding is so imperfect, ambiguous, or uncertain that it will not support a judgment. *p. 618.*

SAME.—Venire De Novo.—A written motion need not be made for a *venire de novo*. *p. 618.*

EXECUTORS AND ADMINISTRATORS.—Reports.—Exceptions.—An administrator's report may be contested by exceptions filed thereto. *p. 619.*

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EXECUTORS AND ADMINISTRATORS.—Decedents' Estates.—Claims.—

Mortgages.—An administrator of a decedent's estate is properly credited in his report as such administrator with the amount of a mortgage assumed by decedent in his lifetime in the purchase of real estate, paid by such administrator, although the mortgage was not filed as a claim against the estate. *pp.* 619-625.

From the Hamilton Circuit Court. *Reversed.*

William Farrell, Kane & Kane and Elliott & Elliott,
for appellant.

W. R. Fertig, H. J. Alexander and George Shirts,
for appellees.

WILEY, J.—Appellant was the administrator of the estate of John Swift deceased, with the will annexed. February 13, 1895, he filed a current report, and on May 13, following, appellees filed exceptions thereto. The issues raised by the report and exceptions were tried by the court, and on motion of appellant, the court made a special finding of facts, and stated its conclusions of law thereon, and rendered judgment against appellant for \$3657.18, disapproving his report, and directing him to amend the same, and to pay into court the amount found to be due. Appellant moved for a *venire de novo*, a new trial, and to modify the judgment, each of which motions the court overruled. Neither the special finding of facts, conclusions of law or judgment specifically show or state what exceptions were sustained and what overruled.

Appellant has assigned errors as follows: (1) The court erred in sustaining each and every one of the exceptions to the report; (2) the court erred in overruling each of the several exceptions to each and every conclusion of law; (3) the court erred in overruling the motion for a *venire de novo*; (4) the court erred in overruling appellant's exception to the judgment; (5) the court erred in overruling appellant's motion for a new trial.

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From the report and the entire record it appears that appellant's decedent died intestate, leaving quite an estate, both in personal and in real property. The exceptors (the appellees here), are heirs and devisees of the decedent, and as such excepted to the report.

Soon after appellant took upon himself the administration of the estate, the appellees and others, who were all the heirs and devisees of the decedent, by power of attorney, constituted appellant their attorney in fact and agent, with full power and authority to lease, sell, and convey the real estate of which the decedent died seized. Appellant accepted said appointment and acted thereunder, and did lease, sell and convey real estate. The funds coming into his hands as administrator, and those derived by virtue of his agency, created by said power of attorney, were intermingled in some instances, and in his report he so represented to the court. His accounts as administrator and as such agent, are somewhat confused as shown by the report and the special findings of fact.

We do not deem it necessary to set out in this opinion, in detail, at length or specifically, the special findings, for every useful purpose will be subserved by referring to them in the course of the discussion and decision of the questions presented.

It is contended with much earnestness and plausible argument of appellees' learned counsel, that the provisions of the statute (section 551, Horner's R. S. 1897) are not applicable here, and hence the special finding should be wholly disregarded. This exact question has never been passed upon by the courts of last resort of this State, but we are inclined to think that the objections urged against considering the special findings, as such, are not available here. While the proceedings to test the correctness of an administrator's report is not, in a broad and technical sense,

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a civil action, yet the report and the exceptions form both issues of fact and of law, for the court to determine, and we are unable to see any valid objections to the court making a special finding of facts and stating its conclusions of law thereon. On the contrary, there are good reasons why the practice is commendable.

Where a special finding of facts is made, it brings to the attention of the appellate tribunal, in case of appeal, all the disputed facts, in an orderly and succinct form, and greatly aids the court in applying the law to them, and in determining the respective rights of the parties. But another reason why appellees' contention should not prevail in the case we are now considering, is that they did not interpose any objection in the court below to its making a special finding of facts, and they should not be heard to complain now. But in addition to the reasons here given, the practice has been recognized, and at least tacitly approved by the Supreme Court. *Taylor v. Wright, Admr.*, 93 Ind. 121, is directly in point. There appellee filed his report in final settlement, and appellant appeared and filed exceptions. The questions presented by the issues thus joined, were tried by the court, a special finding of facts made and conclusions stated thereon. By its conclusions of law, the trial court approved the report. On appeal it was held that the court erred in its conclusions of law. On the facts found, the judgment was reversed, and the court below instructed to reject the report, and require the appellee to file an amended report, etc. So we are not without precedent for holding that in cases of this character a trial court may make a special finding of facts and state its conclusions of law thereon.

The first question which we will consider is that raised by the third specification of the assignment of

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errors. If the court erred in overruling appellant's motion for a *venire de novo*, the other questions presented will not necessarily have to be decided. The general rule prevails in this jurisdiction that a *venire de novo* will be awarded where a verdict or finding is so imperfect, ambiguous, or uncertain that it will not support a judgment. Under the practice in this State, a written motion need not be made, but the question may be presented and raised orally.

In the case before us, however, appellant's motion for a *venire de novo* was in writing, and the grounds assigned are: (1) "The facts are not stated in the finding; (2) the finding states conclusions and not facts; (3) the finding states matters of evidence and not facts; (4) the conclusions of law were not stated on the facts found at the time of the filing and entry of record thereof as the law requires." As to whether appellant is limited within the bounds of his motion, we do not decide.

There are three propositions, about which it seems to us, there can be no doubt or controversy, and they are these: (1) As administrator appellant was chargeable only with the personal assets of the estate that came into his hands as such, and for any defalcation or misappropriation of such funds, he and his sureties were liable. (2) As attorney in fact, and agent of appellees, he was chargeable only with the funds and assets that came into his hands as such agent, and for any defalcation or misappropriation of such funds, he and he alone was liable. (3) The settlement of the estate, in his trust capacity as administrator, had no dependent connection with or relation to the duties imposed upon him in his trust capacity as agent. The two trusts were wholly independent, and the one should not in any manner be connected with the other.

When an administrator files a report, the court

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may, not only by its statutory, but by its inherent power, approve or reject it and order the filing of a new report. Section 2391, Horner's R. S. 1897, defines the power and duty of the court on the presentation of such report, and provides that "any person interested in the distribution of the assets may appear and contest the correctness of the account." While the statute does not provide the manner of contesting the correctness of the account, it is settled by the practice in this State, that it may be done by exceptions. The real question, therefore, in this case, is to determine if we can, from the facts found, the several amounts with which appellant is chargeable as administrator, and for which he is entitled to credit.

One of the exceptions to the report was that appellant paid \$1,241.30 in discharge of a mortgage on land in Kansas, which decedent owned at the time of his death, and for the sum so paid, he was not entitled to credit. We will first take up and dispose of this question. The special finding of facts shows that decedent purchased a tract of land in Kansas, upon which there was a mortgage, and in the deed conveying to him the land it was stipulated that the conveyance was made subject to said mortgage, and that the decedent assumed the payment of the same. There was no express agreement in the deed that decedent would pay the mortgage. Appellant, under his power of attorney, took charge of said land, leased it, collected the rents, paid taxes, and kept up repairs. Under said power of attorney he advertised said real estate for sale, and in such advertisement he designated himself as administrator, and that said sale would be made as an administrator's sale. This mortgage which decedent assumed to pay was never filed as a claim against his estate, and in all of his transactions relating to said real estate, the appellant

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designated himself as administrator. He paid said mortgage including interest, principal, and exchange, in the sum above specified, by a draft purchased by him at a bank where he kept his account, with his individual check, and the finding recites that, "there is no evidence that the funds used in purchasing said draft were proceeds of personal estate which had come into his hands as administrator, and no evidence that he made or assumed to make such payments in the capacity of administrator." The finding further shows that appellant mingled the proceeds received from the real estate with the proceeds of the personal estate, and deposited them in the same bank in his own name, and in his individual account. He paid said mortgage June 17, 1891, and on February 13, 1893, under his said power of attorney, he sold said Kansas land for \$1,400, which sum the findings declare he converted to his own use. Upon these facts, the court, in its conclusions of law, stated that appellant was not entitled to a credit in his report for the amount so paid on said mortgage.

Before considering the legal question here presented, we desire to say that the findings show that the decedent directed by his will the payment of all his debts without specifying the order in which they should be paid. By the contract of assumption in the deed, decedent created a debt against himself, and if he had lived, it could have been enforced against him in his individual capacity. He was personally liable, and by his assumption he became the principal debtor. *Figart v. Halderman*, 75 Ind. 564; *Hancock v. Fleming*, 103 Ind. 533; *Begein v. Brehm*, 123 Ind. 160.

True, the mortgage was not filed as a claim against the estate, but the debt it evidenced was a lien upon real estate, and while there may have been some irregularity in the manner of its payment, it neverthe-

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less was the duty of the administrator to pay it, both by the provisions of the statute and the express terms of the will. Under the statute, mortgage debts have precedence over general debts. Section 2534, Burns' R. S. 1894 (2378, Horner's R. S. 1897). If the administrator had refused to pay the mortgage, and suffered a foreclosure, he would have been liable on his bond for any resulting injury. *State, ex rel., v. Mason*, 21 Ind. 171; *Jewett v. Hurrell*, 121 Ind. 404. The personal estate of a decedent is primarily liable for the payment of his debts, and it has never been held that a decedent's real estate may be sold to pay debts where the personal assets are sufficient to do so. This rule rests upon the ground that the real estate shall be preserved and saved for the heirs. See *La Plante v. Convery*, 98 Ind. 499; *State, ex rel., v. Brown*, 80 Ind. 425; *Cunningham v. Cunningham*, 94 Ind. 557.

Appellees contend that the finding of the court is that appellant paid this mortgage as attorney and agent, and hence is not entitled to credit for the amount paid. We do not so construe the finding. The court found that, as attorney and agent, he took charge of the Kansas land, etc., and that there is no evidence that the funds with which he paid it were proceeds of the personal estate, etc. That he had funds on hand, as proceeds of the personal estate, when he made the payment, there seems to be no question. It was his duty to pay the mortgage, and to pay it out of the proceeds of the personal estate; and, in the absence of any evidence to the contrary, it will be presumed that he did pay it out of such proceeds. This presumption arises from the fact that an officer or trustee is presumed to do his duty. See *Cummins v. City of Seymour*, 79 Ind. 491, 41 Am. Rep. 618; *Benefiel v. Aughe*, 93 Ind. 401; *Baker v. Merriam*, 97 Ind. 539; *State, ex rel., v. Sutton*, 99 Ind. 300; *Enos*

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v. *State, ex rel.*, 131 Ind. 560. An administrator is an officer of the court, for he acts in a fiduciary capacity, and his duties are prescribed by statute, and he is under the direct supervision and control of the court. The presumption prevails until it is overthrown by facts showing the contrary. *Louisville, etc., R. W. Co. v. Thompson*, 107 Ind. 442. This rule that an officer is presumed to do his duty has been extended even to railway companies, employes, and officers, etc. See *Louisville, etc., R. W. Co. v. Bates, Admr.*, 146 Ind. 564, and cases there cited; Elliott on Railroads, section 1701; *Joyner v. South Carolina R. W. Co.*, 28 S. C. 49, 1 S. E. 52; *Jewett v. Kansas City, etc., R. W. Co.*, 50 Mo. App. 547; *Uline v. New York, etc., R. R. Co.*, 101 N. Y. 98, 4 N. E. 536.

The findings relating to the Kansas land are negative in their character and are so uncertain and ambiguous that, in our judgment, we cannot say, as a matter of law, that appellant is not entitled to a credit for the amount paid by him in discharge of the mortgage. While we have not overlooked the well established and firmly grounded rule that the burden was upon the appellant to establish his right to a credit for \$1,241.30, as asked in his report, yet we cannot say he was or was not entitled to such credit from the facts found, because the findings fail to show sufficient facts upon which the court can adjudge, as a matter of law, the respective rights of the parties.

In its first conclusion of law the court declares as one of the items with which appellant is chargeable as administrator is "profit on Wheeler land sold to Mrs. Ford, \$192.50." We are unable to understand upon what basis or finding of fact, this conclusion of law can securely rest. Where special findings of facts are made, the conclusions of law must pertain to such facts, and can only be upheld when applicable thereto.

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While we must be guided as to the facts by the special findings, we have examined the exceptions to the report with very great care, and find that there is no exception upon which such conclusion can rest.

Exception five seeks to charge appellant with \$154.00 as "excess from Wheeler land," but there is not even an exception to the report asking that he be charged with "profit on Wheeler land, etc." If there is a word in the special findings referring directly or remotely in any way to "Wheeler land," we have failed to find it, after most careful and repeated examinations. The report refers to some transactions of appellant regarding the "Wheeler land," but we cannot look to the report for the facts upon which the court bases its conclusions of law.

Referring to findings three and four, the following facts are stated: (3) That the appellant's report as administrator contains a true and correct statement of all charges against him, and all assets for which he is accountable, except \$966.45, net amount realized by sale of Tipton city property on which he took a mortgage of indemnity, and except interest on his distributive share, with which he should be charged to balance like charges for interest made in said report against other heirs. (4) That all items of credit claimed in said report should be allowed, except credits claimed for moneys distributed to heirs, and except \$1,241.30 paid on Kansas land, and except \$1,237.85 paid to S. Snively.

Finding number three purports to be a finding of all charges, of whatsoever kind and character, against appellant in his trust capacity, with the exception of two items,—one of \$966.45, on the sale of Tipton city property, and the other on account of interest on his distributive share, etc. There is no finding that appellant was a distributee under the will, or an heir of

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the decedent, which would entitle him to share in the estate. There is no finding when payments were made to him as a distributee, how much was paid to him, and what the interest charge would be; and there is no finding that he was indebted to the estate upon a note. In finding number twenty-six, some reference is made to undescribed notes by reference to certain numbers on the inventory; but the inventory is not made a part of the record, and, if it was, we could not look to it to determine a substantive fact.

From this statement of facts as to charges and credits, we turn to the conclusions of law, to determine whether the conclusions of law are consistent with the findings. Conclusion of law number one is as follows:

“(a) That said administrator should stand charged with the amount of charges shown in said report.....		\$16,658.80
(b) With net amount of said Tipton property on which he took said mortgage of indemnity		966.45
(c) With interest on his note to the decedent and with interest on his distributive share to balance like charges against other heirs		128.00
(d) With profit on Wheeler land sold to Mrs. Ford		192.50
Total		\$17,945.75.”

From the facts we have already stated, we are unable to see how the trial court concluded, as a matter of law, that appellant was chargeable with \$192.50 as “profit” on the Wheeler land. And what we have said in regard to the last item applies with equal force to the item for \$128.00, which, as stated by the

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court, consists of interest on a note and on the distributive share of appellant. For these reasons, appellant's motion for a *venire de novo*, and his exceptions to the conclusions of law, charging him with \$1,241.30, amount paid on the Kansas land, with \$192.50 profit on the Wheeler land, and \$128.00 interest on note and his distributive share, etc., should have been sustained. In so holding, we do not wish to be understood as deciding that these items are improper charges against appellant, for facts may exist which would make him chargeable with them; but what we decide here is, that under the facts found, the court cannot say, as a matter of law, that he is chargeable with them. An administrator, acting in his fiduciary capacity, cannot be held to too strict an account in the conduct and management of his trust, and courts will construe the law strictly against him in the interest of the estate. In this jurisdiction the boundary lines of his liability are distinctly drawn and clearly marked. While the law will charge him with all the assets of the trust with which he should be charged, it will not impose upon him liabilities and hardships not warranted by facts.

There are other questions presented by the record, and discussed by counsel, but we do not deem it necessary to decide them, as they may not arise on a subsequent trial of the case, and the judgment must be reversed for the reasons given. Judgment reversed, with instructions to the court below to sustain appellant's motion for a *venire de novo*, and for further proceedings not inconsistent with this opinion.

SPENCER v. MCLEAN ET AL.

[No. 2,430. Filed May 25, 1898. Rehearing denied Oct. 4, 1898.]

CONTRACTS.—*Consideration.*—A promise made to a person to induce him to perform an act which he is already legally bound to perform is without consideration, and is not binding on the promisor. *p. 628.*

BONDS.—*Several Liability.*—A bond executed by the stockholders of a corporation to secure the directors thereof as sureties of the corporation, conditioned that any liability incurred should be in the proportion that the amount of stock held by each obligor bears to the whole amount of stock in force, created a several, and not a joint liability. *p. 628.*

PRACTICE.—*Harmless Error.*—*Examination of Witnesses.*—No reversible error is committed in sustaining an objection to a competent question, in the examination of a witness, where the witness afterwards answers substantially the same question. *p. 628.*

BONDS.—*Sureties.*—*Delivery.*—Where a surety signed a bond on condition that the bond was not to be delivered until the other persons named in the body thereof should sign it, a delivery of the bond without their signatures will release such surety from liability. *p. 629.*

PRACTICE.—*Contracts.*—*When Question for Jury.*—The question as to whether or not there was an agreement that a bond should not be delivered until signed by others was properly submitted to the jury, under proper instructions, where the evidence was conflicting. *p. 629.*

From the White Circuit Court. *Affirmed.*

A. M. Reynolds and A. K. Sills, for appellant.

Sellers & Uhl, for appellees.

ROBINSON, J.—It appears that appellant owned five shares of \$50 each of the capital stock of the Tippecanoe Canning Company, a corporation with \$10,000 capital stock; that said capital stock was invested in real estate, a building and machinery; that in February, 1894, appellees were elected directors of said corporation, and entered upon the duties of their trust; that to carry on the business, it became necessary to borrow large sums of money; that on the 2nd day of

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October, 1893, said corporation executed a note, with appellees as sureties to Alice Brearley, in the sum of \$2,000, and on the 26th day of December, 1894, appellees became sureties on the corporation's note to Shirk & McLean in the sum of \$15,000; that on March 4, 1896, after said notes became due, appellees paid \$9,000 on the Shirk & McLean note and \$1,000 on the Brearley note

On the 20th day of April, 1893, appellant, together with a large number of other persons, executed to appellees a bond conditioned that whereas the obligors were stockholders in said corporation, that in the management of the business for 1893 it would be necessary to borrow money from time to time; that appellees had agreed to become surety for such loans, and providing that if such loans should be paid at maturity, and appellees held harmless, the obligation was to be void, otherwise to remain in full force. It was further provided that any liability incurred by reason of the bond should be in proportion to the amount of stock held by each of the obligors at the time of incurring such liability; that the liability should be several and not joint, and no recovery had against any obligor for a sum greater than his share thereof, in proportion as the amount of stock in said corporation held by him at the date of the incurring of such liability bears to the whole amount of stock then issued. On April 2, 1894, a similar bond was executed for money borrowed for the business of 1894, and containing in addition to the conditions of the bond of April 20, 1893, the further provision that each of the obligors agreed to pay his said share with attorney's fees and without relief from valuation and appraisement laws.

Under the bonds, appellant would not be liable for any money paid by appellees by reason of their surety-

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ship, on notes executed prior to the execution of either bond. It is well settled that a promise made to a person to induce him to perform an act which he is already bound in law to perform is without consideration, and is not binding on the promisor. *Smith v. Boruff*, 75 Ind. 412; *Fensler v. Prather*, 43 Ind. 119.

The bond of April 20, 1893, was executed prior to the execution of the Brearley note, and the complaint alleges that appellees became sureties for such loan in consideration of such bond, and on the faith and credit of appellant's promise therein contained. And the bond of April 2, 1894, was executed prior to the Shirk and McLean loan, and it is alleged that appellees become sureties for said loan on the faith and credit of said bond. It cannot be said that the complaint seeks to recover any money paid out as such sureties on loans made prior to the execution of the bonds. The bonds expressly provide that they are several obligations, and not joint. When appellant signed the bond, he incurred a liability in proportion to the amount paid by appellees as the stock then owned by him bore to the whole capital stock. Whether one or more other persons signed the bonds neither diminished nor increased appellant's liability. Appellant's contract was neither a contract of suretyship, nor one of guaranty, and the rule applicable is clearly distinguishable from that declared in *Markland Mining, etc., Co. v. Kimmel*, 87 Ind. 560. See *Deardorff v. Foresman*, 24 Ind. 481; *Madison, etc., Co. v. Stevens*, 10 Ind. 1; *Hunt v. State, ex rel.*, 53 Ind. 321; *Whitcomb v. Miller*, 90 Ind. 384.

No reversible error is committed in sustaining an objection to a competent question, if the same witness afterwards answers substantially the same question. *Norris v. Norris*, 3 Ind. App. 500; *Toledo, etc., R. R. Co. v. Milligan*, 2 Ind. App. 578.

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Whether there was an agreement, when appellant signed the bond that it was not to be delivered until all the stockholders had signed it, was submitted to the jury under proper instructions. The evidence is conflicting as to whether there was such an agreement, and, under a proper instruction, the court left the question with the jury. It is not to be denied that if appellant signed the bond upon the agreement and condition that it was not to be delivered until the others named in the body of the bond had signed it, and it was in fact delivered without their signatures, appellant would not be liable. *Markland, etc., Co. v. Kimmel, supra*. But whether there was such an agreement was for the jury to say from all the evidence.

The obligors in the bonds in question did not guarantee the payment of the debts contracted by the appellees. Nor were they sureties for appellees. The undertaking is between appellant and appellees, to pay to appellees upon a fixed basis, a certain share of any indebtedness appellees might have to pay as sureties for the corporation. It was distinctly an original promise, and not a collateral undertaking of suretyship or guaranty. *Anderson v. Spence*, 72 Ind. 315, 37 Am. Rep. 162. See, also, *Frash v. Polk*, 67 Ind. 55; *Horn v. Bray*, 51 Ind. 555, 19 Am. Rep. 742; *Board, etc., v. Cincinnati, etc., Co.*, 128 Ind. 240. Appellant's liability on the bond attached as soon as appellees paid the debts for which they were sureties. Appellant agreed to pay a certain amount, and also attorney's fees. The promise to pay attorney's fees is an unconditional promise, and is, in effect, not unlike the ordinary attorney fee clause in a promissory note.

In its fifth instruction, the court told the jury: "If you find from the evidence that when the defendant signed the instruments sued on, that it was the agree-

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ment and intention that all the stockholders of said Tippecanoe Canning Company should sign them before they should be delivered, and that they were delivered, and taken possession of by plaintiffs, without the consent of defendant without all the stockholders of said company signing them, you should find for the defendant." This instruction fully covers the third instruction requested by appellant.

The eighteenth and nineteenth instructions requested by appellant, and refused, were to the effect that if, after the notes on which appellees were sureties became due, they had money in their hands of the company sufficient to pay said notes, it was their duty to apply such money on such debts, and if they did not, the finding should be for the defendant. This was fully stated in the eighteenth instruction given by the court.

We have carefully examined the instructions given by the court, and can but conclude that they fully cover all the instructions requested by appellant which were refused, and of which complaint is made by counsel. Judgment affirmed.

VORIS v. STAR CITY BUILDING AND LOAN ASSOCIATION.

[No. 2,497. Filed June 8, 1898. Rehearing denied October 4, 1898.]

STATUTE OF FRAUDS.—*Sales.*—*School Warrants.*—A verbal guaranty of the payment of school warrants by one negotiating the sale thereof is not made for the benefit of a third person in such sense as to bring the promise or guaranty within the statute of frauds, where the warrants were void, and known to the guarantor to be void, and the proceeds of the sale of such warrants inured to the sole benefit of the guarantor. pp. 639-642.

CONTRACTS.—*Ultra Vires.*—*Estoppel.*—An agent who negotiated the sale of school warrants to a building and loan association which inured to his sole benefit is estopped from denying the authority of such association to purchase the warrants in an action against him on his guaranty of such warrants. pp. 643, 644.

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ESTOPPEL.—*Corporations.*—A person dealing with a corporation is presumed to know its powers and the limitations of its authority, and is estopped from pleading its want of authority. *p. 644.*

SPECIAL VERDICT.—*Practice.*—A motion for a judgment on a special verdict is not waived by filing a motion for a new trial before the ruling on the former motion. *p. 646.*

SAME.—*Construction.*—*Practice.*—In construing a special verdict so as to apply the law to the facts, the court should look to the entire verdict, and not to isolated or detached parts of it, and if, after eliminating mere conclusions, there still remains sufficient inferential and ultimate facts, within the issues, upon which the judgment can rest, the verdict is sufficient. *pp. 646, 647.*

SAME.—*Jury Should Find Ultimate Facts.*—It is the duty of a jury, in returning a special verdict, to find inferential or ultimate facts, and not evidentiary facts. *p. 648.*

SAME.—*Fraud.*—Where fraud is an issuable fact, the jury should, in the special verdict, find fraud as an ultimate fact, and not the badges of fraud. *p. 648.*

From the Parke Circuit Court. *Affirmed.*

G. W. Paul, H. D. Van Cleave and Crane & Anderson, for appellant.

George P. Haywood, Charles A. Burnett and Nebeker & Simms, for appellee.

WILEY, J.—This was an action by appellee against appellant, upon his alleged verbal guaranty, whereby it is charged he guaranteed the genuineness, validity, and payment of several separate warrants issued by the trustee of Wabash township, Fountain county, Indiana, to and in the name of one Geo. W. Boyd, for "school supplies." The complaint was in seven paragraphs, and as we will notice each of the paragraphs in the subsequent discussion of the questions presented, we need now only state in a general way the nature of the action.

It is charged that the several warrants aggregated in amount \$3,071.61, and that on July 19, 1894, and before the maturity of said warrants, the appellant was the owner thereof, and that on said day he sold, as-

signed and delivered all of them to appellee for and in consideration of the payment by it, to him, of the sum of \$2,875.25, and that, as an inducement to appellee to purchase said warrants, the appellant guaranteed that they were good and collectible and valid warrants against said school township; that the same would be paid when due, and further guaranteed and promised that if said notes were not paid when due, he would pay the same. It is also charged that, relying upon said guaranty, and promise, appellant purchased said notes; that upon their maturity, the same were presented to one Orahood, who was then the trustee of said township, who refused to pay them; that thereupon appellee informed appellant of such refusal, and presented said warrants to him, and demanded payment from him in accordance with his guaranty and promise; that he failed and refused to pay the same; that they were due and wholly unpaid, etc. The several paragraphs of complaint are substantially the same, except the seventh, and in it is averred that said warrants were issued at the request and under the direction of the appellant, who wrote the same and caused them to be made payable to the order of said Boyd; that said warrants were signed and delivered to appellant by the trustee of said township, and for the use and benefit of appellant.

It is further averred, that instead of the consideration for such purchase being paid to appellant, it was paid to said Boyd, and that said Boyd was the agent of appellant in selling said warrants, and that said Boyd paid over said money to appellant; that the execution of said warrants was procured by the fraud, deceit, misrepresentations, and wrongs of appellant, and that they were not issued in consideration of any sale of goods or property of any kind for the use or benefit of said school township; that there was no con-

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sideration whatever for the issuing thereof; that appellant was fully aware of said facts, and appellee wholly ignorant thereof. Appellant demurred to each paragraph of the complaint, which was overruled, and he excepted. He then filed an answer in two paragraphs, the first of which was a general denial and the second, averring in substance that appellee had no authority to do a banking or discount business, or to discount or purchase the warrants set out in the complaint. A demurrer to this paragraph of answer was sustained. The cause was tried by a jury, and a special verdict was returned. Appellee's motion for judgment in its favor on the special verdict was sustained and a like motion by appellant was overruled. Appellant's motion for a new trial was also overruled.

The errors assigned are as follows: (1) The court erred in overruling appellant's motion for judgment. (2) The court erred in sustaining appellee's motion for judgment. (3) The court erred in sustaining the demurrer to the second paragraph of answer. (4, 7, 8, 9, 11, 12, and 13) The court erred in overruling the demurrer to the several paragraphs of complaint. (5) The court erred in overruling appellant's motion for a new trial. (6) The court erred in giving and submitting to the jury each of the interrogatories in the special verdict from 1 to 59, inclusive.

The following facts are disclosed by the special verdict: That the appellee was and is a corporation, duly organized and doing business under the laws of the State of Indiana; that appellee, on June 29, 1894, was a real estate and loan agent in Crawfordsville, Indiana, and was a note broker and money lender; that on July 19, 1894, appellant purchased each of the orders described in the complaint, and that each of them was indorsed on the back by the name of G. W. Boyd; that said warrants were issued by the trustee

of Wabash township, etc., as renewal warrants for certain others then alleged to be outstanding against said township; that appellee paid therefor \$2,875.25; that appellee purchased said warrants from G. W. Boyd; that appellant received the money from the sale thereof, less \$50 commission to A. O. Behm and \$160 to G. W. Boyd; that on or about June 24, 1894, appellant procured from the trustee of said township the signing of said warrants and their delivery to him; that appellant did not give any value for said warrants; that appellant procured the trustee of said township to sign and deliver said warrants to him for certain other warrants claimed by appellant to be against said township, some of which appellant claimed to be in the hands of one Isaac Davis, and some claimed by him, upon the condition and under the promise of appellant that he would take said renewal warrants and sell them, and with the money pay off and surrender to said trustee appellant's alleged warranty and Davis' said warrants, and, in failing to do so, would return the warrants sued on to the township trustee; that appellant did not deliver or cause to be delivered to said trustee any of the warrants for which the warrants sued on were given; that appellant received said warrants from said trustee on or about June 29, 1894, and placed them in the hands of said Boyd, to be by him sold for the benefit of appellant; that appellee was induced to, and did purchase said warrants because of the representations of appellant that they were valid and existing obligations of said township; that on July 19, 1894, and before the sale of said warrants to appellee, appellant represented to appellee that said warrants were valid and existing obligations of said township, and would be paid when due; that on said day, and before appellee purchased said warrants, appellant promised ap-

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appellee that if it would buy them, that if they were not paid when due by said township, he would pay them; that appellee relied upon the statements, representations and promises of appellant so made; that at the time of said purchase, appellee did not have any knowledge that said renewal warrants had been issued without any consideration, and that it did not know that the warrants were still outstanding for which renewal warrants were issued; that appellee purchased said warrants in good faith; that on June 19, 1894, and before appellee purchased them, appellant guaranteed their payment; that at the time, appellant knew that the warrants for which the renewal warrants sued on were given, were then outstanding against said township and unpaid; that when said warrants were delivered to him by said trustee, he did not give anything for them; that of the amount appellee paid for said warrants appellant received \$2,665.25; that appellant did not pay off the warrants owned by said Davis or any part of them; that appellant did not deliver to said trustee any of the warrants he claimed to own, or claimed that said Davis owned, when said renewal warrants were issued; that appellant or no other person returned to said trustee the renewal warrants purchased by appellee; that appellant procured by fraud, and assisted in procuring by fraud, the issuing of the warrants purchased by appellee; that appellee had no knowledge that said warrants had been fraudulently procured; that the statements made by appellant to appellee that said renewal warrants were good, etc., were false and fraudulent; that he knowingly made such representations, and that such representations induced appellee to make such purchase; that said renewal warrants had no value whatever; that said Davis did not give appellant or Boyd any authority to procure renewals

of any of his warrants; that said Boyd assisted appellant in procuring and negotiating said warrants, and so acted in the interest of appellant; that when said warrants became due, appellee presented them to the trustee of said township and demanded payment, which was refused; that thereupon appellee made a demand upon appellant for payment, which was also refused, which was done before this action was commenced; that neither appellant or said Boyd ever delivered to said trustee the warrants for which said renewal warrants were issued; that of the money paid by appellee for said renewal warrants, appellant applied to his own use the sum of \$2,665.25; that appellee is entitled to recover of appellant \$2,875.25, with six per cent. interest from July 19, 1894; that when appellee purchased said warrants, it was induced to believe, and did believe, from the statements and representations of appellant, that they were valid and binding obligations against said township; that on or about July 10, 1894, said Boyd delivered the warrants described in the complaint, together with two affidavits as to their genuineness, and that they were renewals of warrants previously issued for school supplies, etc., to Adam O. Behm, to be by him sold, and the proceeds, less the discount and commission, to be delivered to said Boyd; that appellee's board of directors consisted of fifteen persons; that there was no meeting of the board of directors held July 19, 1894; that said board of directors never considered the purchase of said warrants, or authorized the same; that the board of directors of appellee appointed an executive committee to transact the business of said corporation for the year 1894; that William W. Smith was president of appellee, and that he appointed Adam O. Behm, William Horn and Leopold Nierman as an executive committee, and they were such com-

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mittee July 19, 1894; that the purchase of said warrants was considered and made by said executive committee; that the purchase price for said warrants was paid to said Boyd on the authority and order of said board of directors; that said Behm was the agent of said Boyd in making said sale, and he received a commission of \$50.00 for his services, paid by Boyd; that at said time, said Behm was attorney of appellee, and a member of the board of directors; that when said sale was made, appellant owned said renewal warrants, and on July 19, 1894, sold them to appellee; that when the said renewal orders were executed, the trustee of said township took from said Boyd a receipt therefor as follows: "Coal Creek, Indiana, June 29, 1894. Received of George Winters the following orders or warrants: One for \$585; one for \$408; one for \$627; one for \$769; one for \$191.76; one for \$245.20; one for \$245.20. Said orders to be cashed by me and as said orders are cashed, I hereby agree to return the old orders for which these are given. In case I fail to get orders cashed, then I agree to return said orders given this day. [Signed.] G. W. Boyd."

It is earnestly insisted by appellant that neither paragraph of the complaint states facts sufficient to constitute a cause of action, and the objections urged against the complaint are: (1) That the promise or guaranty of the appellant, as appears from the complaint, was verbal, and that it comes within the statute of frauds. (2) That the act of the appellee corporation in purchasing the warrants was *ultra vires* and void, and hence it could not recover from the appellant the money it paid to him. For an intelligent discussion of these first propositions, a brief synopsis of the several paragraphs of the complaint will not be out of place.

The first proceeds upon the theory that appellant

was the owner of the warrants; that he guaranteed that they were good and collectible and valid obligations against the township; that they would be paid when due, and, if they were not paid, he would pay them; that appellee relied upon such representations and promises, and paid appellant the sum named, etc. It is then charged that, when the warrants became due, they were presented for payment, which was refused; that appellant was informed of such nonpayment, and a demand made upon him for payment. It is to be remembered that this paragraph did not question the validity of the warrants, but sought a recovery upon the express verbal guaranty of appellant, and that such guaranty was made for the interest and benefit of appellant, who was the guarantor. The second paragraph is in all essential respects like the first. The third paragraph proceeds upon the theory that appellant was the owner and in possession of the warrants on the day of the sale to appellee; that he made (and appellee relied upon the same) representations set out in the first paragraph; that the township refused to pay them for the reason that they were not the obligations of the township; that appellee learned, after their maturity, that the warrants were not valid or binding obligations of the township, and that they never had any value, and the recovery sought in this paragraph was bottomed on the express verbal guaranty, made by appellant for his own benefit, as well as upon the implied guaranty, because of the representations made by the appellant, that the warrants were the valid obligations of the township. The theory of the fourth paragraph is that as the warrants were absolutely null and void, appellee was entitled to recover for money had and received by appellant from appellee, with six per cent. interest, because of the want of any consid-

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eration for the payment of the money to appellant. The fifth paragraph sets out all the facts relied upon and relating to the whole transaction, to the effect that the warrants were issued without any consideration, on appellant's promise to have them cashed and take up outstanding orders, for which the renewal warrants were issued; that he would return said renewal warrants if he did not take up the outstanding warrants; that he failed to do so; that he made the representations heretofore set out, and it was claimed that appellee was entitled to recover because of a failure of consideration. The sixth paragraph proceeds upon the same theory as the fifth. The seventh paragraph of complaint has already been noticed at some length, and it is only necessary to state further that the theory upon which it proceeds, as we construe it, is that the appellee was entitled to recover upon the express guaranty expressed therein, and also under an implied guaranty by reason of the representations of appellant that the warrants were good and valid obligations against the township.

The first objection urged to the complaint is well taken, if the promise or guaranty of appellant was made for the benefit of a third person, for then it would come within the express inhibition of the statute of frauds and perjuries. If, however, it was a promise or guaranty made for the benefit of the appellant, it must be considered as an original promise, and binding. In *Beaty v. Grim*, 18 Ind. 131, it was held that an agreement made by the sellers of a contract for the delivery of hogs in reference to the performance by them, of its stipulations, in the event of the failure of the original contracting parties, was not within the statute of frauds, and could be enforced. And so a verbal guaranty of a note that it is genuine, and its maker able to pay it, made by the assignor to

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the assignee at the time of the assignment and delivery, based upon a sufficient consideration, is a binding and valid obligation. *King v. Summitt*, 73 Ind. 312, 38 Am. Rep. 145.

The point we are now discussing is clearly and forcibly stated in *Board, etc., v. Cincinnati Steam Heating Co.*, 128 Ind. 240, by Elliott, J., as follows: "Where the owner of property undertakes to pay for work and materials to be done and furnished subsequently by a sub-contractor in order to secure the completion of a building in a case where the principal contractor has failed to carry on the work, the promise is an original one, and not within the statute of frauds. This principle is intrinsically just, and its enforcement does not in the slightest degree tend to the mischief the statute of frauds and perjuries was intended to repress." In *Emerson v. Slater*, 22 How. 43, the Supreme Court of the United States said: "But whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability." In *Horn v. Bray*, 51 Ind. 555, 19 Am. Rep. 742, it was held that where a party who is surety for the maker of a note procures others to sign as sureties by promising to indemnify them and save them harmless, such promise is an original undertaking, not within the statute of frauds, and may be proved by parol.

It has been held in New York that where a third party represented that the note of another was good, that it would be paid at maturity, that he would guar-

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anty that it would be paid at maturity, and it proved that it was not good, and was not paid at maturity, such guaranty was an original promise and could be enforced. *Bruce v. Burr*, 67 N. Y. 237. In some jurisdictions it is held to be a presumption of law that, if any direct benefit to the promisor is the object sought to be obtained by his promise, he must be understood to intend an original undertaking, which is not within the statute. *Westmoreland v. Porter*, 75 Ala. 452; *Chapline v. Atkinson*, 45 Ark. 67, 55 Am. Rep. 531; *Lerch v. Gallup*, 67 Cal. 595.

From a review of many authorities gathered from a number of the states, we feel fully justified in saying that wherever there is in existence an obligation on the part of another, a promise to perform that obligation, if he does not, or to guaranty his performance, is not within the statute of frauds, if it is made upon a new consideration inuring to the benefit of the promisor, although the former obligation is not extinguished, provided the chief purpose of the promisor is to obtain a benefit to himself. *Thornton v. Williams*, 71 Ala. 555; *Westmoreland v. Porter*, *supra*; *Chapline v. Atkinson*, *supra*; *Lerch v. Gallup*, *supra*; *Williamson v. Hill*, 3 Mackey (D. C.) 100; *Mathers v. Carter*, 7 Ill. App. 225; *Borchsenius v. Canutson*, 100 Ill. 82; *Clifford v. Luhring*, 69 Ill. 401; *Power v. Rankin*, 114 Ill. 52, 29 N. E. 185; *Fears v. Story*, 131 Mass. 47; *Walker v. Hill*, 119 Mass. 249; *Fitzgerald v. Morrissey*, 14 Neb. 198, 15 N. W. 233; *Whitehurst v. Hyman*, 90 N. C. 487; *Jefferson County v. Slagle*, 66 Pa. St. 202; *Merriman v. McManus*, 102 Pa. St. 102; *Lookout Mountain R. R. Co. v. Houston*, 85 Tenn. 224, 2 S. W. 36; *Muller v. Riviere*, 59 Tex. 640, 46 Am. Rep. 291; *Spann v. Chóchran*, 63 Tex. 240. See, VOL. 20—41.

also, 1 Daniel on Negotiable Inst., section 739a; 2 Daniel on Negotiable Inst., sections 1761, 1762, 1763; *Bell v. Dagg*, 60 N. Y. 528; *Ross v. Terry*, 63 N. Y. 613; *Smith v. Corege*, 53 Ark. 295, 14 S. W. 93; *Malove v. Keener*, 44 Pa. St. 107; *Huntington v. Wellington*, 12 Mich. 10; *Brown v. Curtiss*, 2 N. Y. 225; *Cardell v. McNiel*, 21 N. Y. 336; *Fowler v. Clearwater*, 35 Barb. 143; *Dauber v. Blackney*, 38 Barb. 432; *Bruce v. Burr*, *supra*.

How much more forcibly must the rule announced apply, if the promise or guaranty is made where there is no valid or binding obligation, as in this case. Here the sole benefit arising from appellant's promise or guaranty inured to him. It could not, in the very nature of things, inure to the township, the payment of whose pretended and fraudulent warrants were guaranteed, for the township was not bound by them.

In the case before us, appellant's promise was to answer for a pretended debt of another, which was not enforceable, which in fact was void, and no debt at all, and hence it was not a promise to answer for the debt of another, but by the promise the appellant became the original debtor, and the obligation became his own. *King v. Summitt*, *supra*.

Another principle which clearly takes appellant's promise without the statute is that, the person or party for whom the promise was made, was not liable on the pretended warrants. See *Downey v. Hinchman*, 25 Ind. 453; *Crosby v. Jeroloman*, 37 Ind. 264; *Ellison v. Wisheart*, 29 Ind. 32.

In *Anderson v. Spence*, 72 Ind. 315, 37 Am. Rep. 162, it was said: "The genral rule running through almost all the cases is, that, if the third person is not liable, then the undertaking is not within the statute. This

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doctrine is exemplified in the great number of cases, which hold that a promise to answer for the debt or default of an infant or *feme covert* is not within the statute, because there is no third person bound." *Board, etc., v. Cincinnati Steam Heating Co., supra*; *Keesling v. Frazier*, 119 Ind. 185; *Shaffer v. Ryan*, 84 Ind. 140; *King v. Summitt, supra*.

Appellant's second contention, that the contract between appellee and himself was *ultra vires* and void, as shown by the complaint, cannot, in our judgment be maintained. In plain terms, appellant insists that though he made the contract pleaded, that the appellee was induced to invest its money on the fraudulent representations and promises made by him; that the contract inured to his sole benefit and he received from appellee nearly \$3,000 of its money. he is entitled to avoid the performance of the contract on his part, on the ground that the appellee had no authority to make the contract. This would be a most monstrous and inequitable doctrine, and one to which the courts will not lend their aid to uphold. The law delights in equity, and courts seek to apply both the broad and wholesome rules of equity, as well as the less exacting rigors of the law. A national bank is not authorized to loan its money upon mortgage security; yet, if its cashier, or other officers make such a loan, the bank may compel the borrower to pay the debt thus created. Notwithstanding the loan thus made was in direct violation of a statute, yet a debt would be created and could be enforced. *National Bank v. Mathews*, 8 Otto 621. Here appellant has had the benefit of his contract with appellee. The contract was fully performed. He received from appellee a large sum of money on the contract, and now he cannot be heard to say that such contract, and its performance were not within the legitimate powers of the corpora-

tion, or that they were not authorized or acquiesced in by appellee corporation. 2 Beach on Private Corporations, par. 424, p. 702; Sedgwick on Stat. and Constr., 73; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 70, 20 Am. Rep. 504; *Ex Parte Chippendale*, 4 De. G. M. & G. 19; *In re National, etc., Soc.*, L. R. 5 Ch. App. 309; *In re Cork, etc., R. R. Co.*, L. R. 4 Ch. App. 748; *Fishmongers' Co. v. Robertson*, 5 McG. 131; *DeGraff v. American, etc., Co.*, 21 N. Y. 124; *National Bank v. Whitney*, 103 U. S. 99; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419; *Steam Navigation Co. v. Weed*, 71 Barb. 378; *Leavitt v. Pell*, 27 Barb. 322; *Standard Oil Co. v. Scofield*, 16 Abb. (N. C.) 372; *Oil Creek, etc., R. R. Co. v. Penn. Transportation Co.*, 83 Pa. St. 160; *Ehrman v. Union Cent., etc., Ins. Co.*, 35 Ohio St. 324; *Chicago, etc., R. W. Co. v. Derkes*, 103 Ind. 520; *State Board, etc., v. Citizens' Street R. W. Co.*, 47 Ind. 407; *Sturgeon v. Board, etc.*, 65 Ind. 302; *Poock v. La Fayette Building Assn.*, 71 Ind. 357.

Another rule which antagonizes appellant's contention is that one who deals with a corporation is presumed to know the powers and limitations of its authority, and hence is estopped to plead its want of authority. 2 Beach on Private Corporations, p. 703, section 424; *Pearce v. Madison, etc., R. R. Co.*, 21 How. 441; *Alexander v. Cauldwell*, 83 N. Y. 480; *Davis v. Old Colony R. R. Co.*, 131 Mass. 258, 41 Am. Rep. 221; *Downing v. Mt. Washington Road Co.*, 40 N. H. 230. In *Kelly v. Mobile Building and Loan Ass'n*, 64 Ala. 501, it was said: "The loan to the appellant may not have been in conformity to, or may have been in contravention of, the by-laws of the association; but it was not *ultra vires*. By-laws of a corporation

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are not enforced by avoiding contracts made in violation of them."

The case of *Poock v. Lafayette Building Ass'n, supra*, is directly in point here. In that case Woods, J., speaking for the court, said: "If it were conceded, as counsel claim, that appellee exceeded its powers in making the loan and taking the note in suit, it does not follow that the note should not and cannot be enforced against the makers. Appellants [sureties on the notes] and their principal were under no incapacity to borrow, and to give their notes for the amount of the loan, and their unwillingness to pay, according to their promise, cannot be justified under a plea that the lender had no right to give the credit. The law may have its reproaches, but this is not one of them." Citing, *State Board, etc., v. Citizens Street R. W. Co., supra*; *National Bank v. Matthews, supra*.

Here appellant was under no legal disability or incapacity from entering into the contract he made with appellee, and hence under the authorities, he cannot avoid liability on the pretense that appellee had no right or authority to enter into the contract with him. The demurrers to the several paragraphs of the complaint were properly overruled.

The second paragraph of appellant's answer, as we have seen, goes upon the theory that the appellee had no authority to enter into the contract it made with appellant, and hence such contract was null and void. What we have said, and the principles discussed, relative to the complaint, apply with equal force to the second paragraph of answer, and it necessarily follows that there was no error in sustaining the demurrer to it, and we need not further discuss the question.

The motions by appellant and appellee for judgment on the special verdict, and the rulings thereon,

may very properly be considered together, as they present substantially the same question. In the discussion of these questions by the learned counsel of appellant, they traverse largely the grounds of their arguments as to the sufficiency of the complaint.

Appellant's brief is of unusual length, and many authorities are cited upon the several principles of law applicable to special verdicts. We do not think that a review here of those authorities and principles, would subserve any useful purpose. Appellee insists that appellant waived his motion for judgment in his favor on the special verdict, by filing his motion for a new trial, before the ruling on the former motion. We cannot concur in this insistence. There are good reasons why this position cannot be maintained, but we need not discuss them. It is enough to say that the exact question has been decided adversely to appellee. *Cincinnati, etc., R. W. Co. v. Grames*, 8 Ind. App. 112; *Leslie v. Merrick*, 99 Ind. 180.

Appellant contends that his motion for judgment on the special verdict should have been sustained, because: (1) The findings on certain pivotal questions are mere conclusions, and not findings of inferential or ultimate facts, and (2) that the verdict contains such facts as show either a want of power or authority in appellee to make the contract, or which show that it was impossible for appellee to make the contract. In construing a special verdict so as to apply the law to the facts found, the court should look to the entire verdict, and not to isolated or detached parts of it. It may be truthfully said that some of the facts stated are mere conclusions, and that there are some contradictions in the verdict, as appellant contends, but these do not impair the verdict to such an extent that it will not support a judgment, if from the whole verdict the apparent contradictions can be reconciled.

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and after eliminating what seems to be mere conclusions, there still remain sufficient inferential and ultimate facts, within the issues, upon which the judgment can rest. This proposition is so firmly fixed by the authorities that their citation and further discussion is useless.

We have already set out in this opinion all material and essential facts as found, and we need not refer to them again in detail. We think, when considered as a whole, there are no fatal contradictions in the verdict, and after eliminating everything that might be construed as conclusions, there still remains every essential fact requisite to the support of the judgment.

It is found that the warrants were procured through fraud and false representations by appellant and Boyd; that though they were issued in the name of Boyd, they were, in fact, the property of appellant; that appellant made Boyd his agent to negotiate them; that he represented that they were valid and binding obligations of the township; that they would be paid when due; that if they were not so paid he would pay them himself. He guaranteed their genuineness; appellee relied upon his representations, purchased the warrants in good faith, and paid to him therefor nearly \$3,000.

The verdict further finds that appellee was a corporation, with a president and a board of directors; that the president appointed an executive committee for 1894, who had authority to act for the corporation during that year; that the negotiations between appellant, which resulted in the sale and purchase of the warrants were conducted on behalf of the appellee, by and through such executive committee; that the money paid for said warrants was paid pursuant to the authority and order of the board of directors

of the appellee; that the warrants purchased were renewal warrants, which were issued for the purpose of paying off and canceling warrants then outstanding; that they were issued at the request of appellant, on his promise and agreement that he would have them cashed and take up said outstanding warrants, and surrender them, and failing to do so, he would return said renewal warrants; that he did not pay or take up such outstanding warrants, and did not return said renewal warrants.

It is further found that when said warrants became due, they were presented for payment, which was refused; that a demand was then made upon appellant for payment, which was also refused, and that there was no consideration whatever for said renewal warrants. It is the duty of a jury in returning a special verdict, to find inferential or ultimate facts, and not evidentiary facts. Upon the *resume* of the facts found, as we have just stated them, it seems to us that they are amply sufficient to support a judgment.

It is contended by appellant that it was a mere conclusion for the jury to find that the issuing of the renewal warrants was procured by fraud, etc., as found by the answer to interrogatory number twenty-nine. The alleged fraud of appellant was a material fact charged, and appellee had the burden of proving it. The rule seems to be firmly established in this jurisdiction, that where fraud is an issuable fact, it is the duty of the jury to find fraud as an ultimate fact, and not the badges of fraud. *Lockwood v. Harding*, 79 Ind. 129; *Morris v. Stern*, 80 Ind. 227; *Elston v. Castor*, 101 Ind. 426, 51 Am. Rep. 754; *Caldwell v. Boyd*, 109 Ind. 447; *Stix v. Sadler*, 109 Ind. 254; *Jarvis v. Banta*, 83 Ind. 528. This the jury did in a plain, unequivocal manner.

We fail to find sufficient infirmities in the verdict to

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warrant a reversal of the judgment. On the contrary, the verdict taken and considered as a whole, is remarkably clear, plain, and explicit. Courts are slow to lend their aid to those who have perpetrated frauds and grievous wrongs, to the injury of others, which frauds and wrongs have resulted to the material benefit of such wrongdoer, so that they may escape their just deserts, and will not do so, for by so doing it would prove a reproach to the law, and do violence to equity. As the questions arising under the motion for a new trial have been fully considered in discussing other questions, we need not notice them further.

Appellant's contention that the court erred in submitting certain interrogatories to the jury cannot be maintained. The question is properly presented by bill of exceptions, but after a careful consideration of the interrogatories complained of, we are clearly of the opinion that there is no reversible error in the ruling of the trial court thereon. The judgment is right under the facts, and a correct conclusion reached. Judgment affirmed.

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[No. 2,506. Filed May 13, 1898. Rehearing denied Oct. 4, 1898.]

APPEAL.—*Review of Conflicting Evidence.*—Where the evidence is conflicting the verdict of the jury will not be disturbed on appeal. *p. 653.*

INSTRUCTIONS.—*Special Verdict.*—*Harmless Error.*—Where the jury is instructed to return a special verdict the giving of general instructions is harmless error. *p. 658.*

From the Tippecanoe Circuit Court. *Affirmed.*

R. P. Davidson and *D. E. Storms*, for appellants.

John F. McHugh, for appellee.

HENLEY, J.—This action grew out of an alleged deposit of \$200 made by the appellee with the appellant.

It was contended by the appellant that the deposit made by the appellee was \$20 and not \$200, and that credit only to the amount of \$20 was given appellee when the said deposit was made.

The complaint is in three paragraphs. The first paragraph charges that appellant is a national bank, and a bank of discount and deposit, and that on the 19th day of December, 1892, appellee became a depositor in said bank, and thereafter from time to time he deposited various sums of money with the appellant, and from time to time issued his checks against the same; that on January 15, 1895, he deposited with the appellant the sum of \$200, but that appellant entered the same as \$20 and that appellant now claims that appellee only deposited said sum of \$20 on that day, and that said claim so made by appellant is unjust, and that there is due and owing from appellant to appellee for money so deposited, and not repaid to him, the sum of \$200. The transcript of appellant's account with appellee, showing the amounts deposited, and the amounts checked out, and the balance alleged to be due appellee, is filed with this paragraph of complaint and made a part thereof. It is further alleged in said first paragraph of complaint that appellee, before the beginning of this action, duly demanded the amount alleged to be due him of the appellant, who declined and refused to pay the same; that the \$200 with interest is due and unpaid.

It is charged in the second paragraph of complaint that at various times between the 19th day of December, 1892, and the 11th day of September, 1895, the appellant received the sum of \$2,000 from the appellee for the use and benefit of the appellant; that afterwards, and before the beginning of this action, appellee demanded payment thereof from the appellant, and that there was at the time of such demand,

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and is now due and owing appellee from appellant, the sum of \$200, for which judgment is demanded. *

The third paragraph of appellee's complaint charges that appellant is indebted to appellee in the sum of \$200 for money had and received from appellee by appellant for the use and benefit of appellant, which sum is now due and unpaid. To this complaint the appellant answered by general denial. The cause was submitted to a jury for trial, and upon the request of appellant's counsel, the court ordered the jury to return a special verdict. The special verdict so returned was one governed by the act of 1895, and is in the form of interrogatories and answers thereto. Both parties to this action moved for judgment upon the special verdict. The motion of appellee was sustained, and judgment rendered in his favor. Appellant moved for a new trial, which motion was overruled, and an appeal prayed to this court.

Appellant assigns as error: (1) That the complaint does not state facts sufficient to constitute a cause of action against appellant; (2) that the first, second, and third paragraphs of complaint, and each of them, do not state facts sufficient to constitute a cause of action against appellant; (3) the overruling of appellant's motion for judgment upon the special finding and verdict of the jury; (4) sustaining appellee's motion for judgment upon the special findings; (5) overruling the motion in arrest of judgment; (6) overruling motion for a new trial.

It is found by the jury in the special verdict in this cause, that appellant is a national bank, duly incorporated under the laws of the United States; that on the 15th day of January, 1895, and prior thereto, it was a bank of discount and deposit; that appellee was at said time a depositor in said bank and had, between the 19th day of September, 1892, and the 11th

day of September, 1895, deposited various sums of money in said bank, and had during such time from time to time checked against such deposits, and that he had, on the 15th day of January, 1895, deposited in said bank the sum of \$200, and that the said bank did on that day enter such deposit on the deposit book of appellee as \$20 and not as \$200, and that the difference between \$200 and \$20, to wit, \$180, has never been paid to the appellee by said appellant bank, and that the same is now due and owing appellee from the appellant, and was so due on the 16th day of November, 1895, at the time of the commencement of this action, and that appellee on the 13th day of November, 1895, before the commencement of this action, demanded of the appellant payment of the said sum of \$180, which amount was due with interest, at the time of the commencement of this action; that the claim of appellant that appellee only deposited \$20 in said bank on the 15th day of January, 1895, is incorrect, and that the appellee's claim that he deposited in appellant's bank the sum of \$200 is true.

It is further found that the appellee deposited with the appellant, between the 19th day of September, 1892, and the 11th day of September, 1895, \$2,000 or more, and that there is now due and owing to appellee on account of such deposits, the sum of \$180; that between said last mentioned dates appellant received of appellee, for the use and benefit of appellant, moneys aggregating more than \$2,000, and that of such sum so received there is now due and owing to and unpaid to appellee the sum of \$180, and that such sum should bear interest at the rate of six per centum per annum from the 13th day of November, 1895. It will thus be seen that the jury found in favor of appellee upon every question of fact neces-

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sary to sustain each paragraph of his complaint. The answers are complete, clear, and conclusive. Upon the special findings so returned, the lower court could not have done otherwise than render judgment in favor of appellee.

As to the evidence, which is properly in the record in this cause, we have very carefully examined it, and while under the strict rules of business generally obtainable in banks, it would seem impossible that a mistake of as much as \$180, or even of any amount could occur, and at the same time the books of the bank balance, and show no discrepancy whatever, yet the evidence is contradictory, the bank officials testifying that on the day the deposit in dispute was received, appellee only deposited \$20, and that the books on the evening of that day showed no discrepancy, but balanced to a cent. The evidence of appellee was positive to the effect that on the day mentioned, he deposited \$200 and that immediately on finding that the bank had given him credit but for \$20 he notified them, and asked that the amount be corrected in his pass book, and that instead of being credited with \$20 he be credited with \$200. He was corroborated by another witness and by some circumstances which appear in the case. From our examination of the evidence, we cannot say that the jury was not justified in returning the facts as they have returned them. The evidence is so conflicting that we cannot disturb the finding of the jury thereunder.

It is next contended by counsel for appellant that the court erred in giving certain instructions to the jury. It is not necessary that we discuss the instructions complained of. It has often been held by this court and by the Supreme Court of this State, that the giving of general instructions to the jury, where they

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are directed to return a special verdict, is improper, but that it is harmless error. *Lake Erie, etc., R. R. Co. v. Gould*, 18 Ind. App. 275. The record in this cause presents no error for which this court could grant any relief to appellant. The judgment is affirmed.

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[No. 2,536. Filed June 9, 1898. Rehearing denied Oct. 4, 1898.]

GAMING.—*Wager.—Disaffirmance.—Recovery of Money in Hands of Stakeholder.*—Either party to a wagering contract may disaffirm such contract before the determination of the event upon which the wager is laid, and may maintain an action against the stakeholder for the recovery of the money or property in his hands so wagered, after a demand made upon him for the surrender thereof.

From the Rush Circuit Court. *Affirmed.*

Smith, Cambern & Smith, for appellant.

Cullen, Martin & Megee, for appellee.

BLACK, J.—The appellee as plaintiff, recovered judgment against the appellant for \$107.00. The appellant has presented the question as to the sufficiency on demurrer of a paragraph of complaint in which it was shown that on the 9th of March, 1896, the appellee executed and placed in the hands of the appellant a check drawn on the Rush County National Bank, of Rushville, Indiana, the check being payable to George W. Offutt or bearer; that it was so placed in the hands of the appellant upon a wager between the appellee and said Offutt, to be delivered by the appellant to said Offutt upon the determination of a certain event, provided said Offutt should be the winner of said wager; that before the determination of the event upon which the wager was made, the appellant delivered the check to said Offutt, who presented it to said bank for payment, and it was paid by the bank out of the funds of the appellee; that said Offutt afterward

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gave the proceeds of said check to the appellant, who thereupon deposited the same in said bank, and caused the same to be placed to his credit in said bank, and the money still remained in the bank to the credit of the appellant; that before the wager was determined, the appellee notified the appellant that the former "disaffirmed said illegal contract, and demanded said amount from" the appellant.

Money won on any wager and paid or delivered to the winner with the consent of the loser can not be recovered back without provision to such effect by statute. *M'Hatton v. Bates*, 4 Blackf. 63; *Woodcock v. McQueen*, 11 Ind. 14; *Morris v. Philpot*, 11 Ind. 447; *Schlosser v. Smith*, 93 Ind. 83; *Davis v. Leonard*, 69 Ind. 213. In *Alexander v. Mount*, 10 Ind. 161, it was held that a party to a bet upon an election might recover from the stakeholder the amount staked, if such party had notified the stakeholder at any time, while the money was still in his possession, not to pay it over, whether or not the contingency on which payment depended had happened at the time of such notice; and that if, after such notice, the stakeholder paid the wager to the winner, the loser did not need to demand repayment before suing the stakeholder. See, also, *Morris v. Philpot*, *supra*; *Frybarger v. Simpson*, 11 Ind. 59; *Burroughs v. Hunt*, 13 Ind. 178. The action against the stakeholder to recover the amount deposited by the party suing, still remaining in the hands of the stakeholder, is not a suit on the contract of wager, but is based upon a disaffirmance of that contract, and is an action for money had and received for the plaintiff's use. *Worthington v. Black*, 13 Ind. 344.

The complaint does not show the character of the event upon the determination of which the check or money was to be given by the stakeholder to the winner. It does not show which party was the winner, or

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indeed, that the event on which the wager was laid had transpired. It appears that the stakeholder, through the payee of the check, had drawn the money upon it before the determination of the event upon which the wager was made, and still retained it. When the money thus came into the possession of the appellant it was the appellee's money held by the stakeholder. Before the determination of the wager, that is, before either party to the wager had become a winner or loser, and hence while the appellee's property was held by the stakeholder as such, the appellee gave notice of his disaffirmance of the contract to the stakeholder and demanded the money from him.

Our courts will not lend their aid to the winner to recover from the loser money won upon any gaming contract, but in the action for such recovery will treat the wagering contract as void. We are of the opinion that where money or property staked upon any wager is still in the hands of the stakeholder, either party to the wagering contract may disaffirm it by giving notice to that effect to the stakeholder, and, having demanded of the stakeholder the return of the money or property so held by him for such party, may have his action against the stakeholder, at least when such disaffirmance and demand precede the determination of the event upon which the wager was laid, which is as far as the decision need extend under the facts of the case before us. See 8 Am. & Eng. Ency. of Law, 999. Judgment affirmed.

Henley, C. J., took no part in the decision of this cause.

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[No. 2,585. Filed June 14, 1898. Rehearing denied Oct. 5, 1898.]

REFLEVIN.—*Demand.*—Where personal property is unlawfully taken it is not necessary to demand the return of the property before bringing an action in replevin. p. 658.

MUTUAL BENEFIT ASSOCIATION.—*Rights of Seceders to Lodge Property.*

—Where the majority of the members of a subordinate lodge withdraw from the jurisdiction of the grand lodge, the minority, who continue steadfast in their allegiance, and to whom the charter was again delivered, are, as between them and the seceding majority, entitled to the property of the lodge. pp. 659-663.

From the Lake Superior Court. *Affirmed.*

Johannes Kopelke, for appellants.

A. F. Knotts and *L. P. Boyle*, for appellees.

COMSTOCK, J.—Suit by appellees (plaintiffs below), who are members of Court Glueckauf No. 101, operating under the jurisdiction of the High Court of the Independent Order of Foresters of the state of Illinois, against Court Glueckauf No. 1, operating under the jurisdiction of the High Court of the Independent Order of Foresters of the State of Indiana, and the members of said court, for the possession of certain regalia, furniture and other articles constituting the outfit of a lodge.

Appellees are an unincorporated association, but the High Court, under whose jurisdiction they are acting is duly incorporated under the laws of the state of Illinois. The trial court rendered judgment for the appellees and overruled appellants' motion for a new trial. This action of the court is assigned as one of the errors in this court, and is the only assignment discussed by counsel. The reason specified in the motion for a new trial is that the finding of the court is

not sustained by sufficient evidence, and is contrary to law.

Appellees are, and appellants were, with a few exceptions, until the 11th day of December, 1893, members of Court Glueckauf No. 101. On that night, a majority of the members being present, a resolution was passed by said lodge No. 101 to secede from the high court of Illinois, and to join in the organization of a high court for the State of Indiana. Some of the members dissented from the proposition, but subsequently all but ten surrendered their certificates in the old order, pursuant to a notice that such course would be necessary in order to become members of the new order. At the date of said secession, said lodge had eighty-one members in good standing; forty-three were present; twenty-seven voted; twenty-three of these voted for secession and four against. The next meeting of the seceding members, after said 11th day of December, was not held in the old lodge hall, but they subsequently came back, and took possession of the Court Glueckauf lodge room and the property in controversy. On Monday following the 11th day of December, 1893, a portion of the members met at their regular meeting place and twenty-three of them signed a statement, which was sent to the grand lodge of Illinois, to the effect that they would recognize their allegiance to such high court, and requested the return of their charter, which the high chief ranger of the local court had in the meantime returned to such high court. The charter was returned to them, and from thence forward such members and the accessions to the membership have constituted the local court, and have been recognized by the high court of Illinois as Court Glueckauf No. 101.

Appellants' first proposition is that the absence of proof of any demand on the part of appellee upon ap-

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pellants to give up the property in controversy must defeat a recovery. It is insisted by appellees that the evidence shows that a demand for possession was made by the deputy high chief ranger (the only officer of the lodge who did not secede) by virtue of his position representing the high court and the subordinate court. But, if the taking was unlawful, and without right, no demand was necessary, and this question is to be determined by a consideration of the merits of the controversy.

The question as to who was the owner of the property must be answered from the circumstances under which it was acquired and the laws governing the organization. It was purchased by Court Glueckauf Lodge No. 101, partly from the high court of Illinois and partly elsewhere. Not having been incorporated, appellants' learned counsel contend that the relations of its members were, in a limited sense, like those of partners, and that they were, therefore, joint owners of the property that they had acquired together; that one joint owner has as much right to the possession of the common property as another, and that, therefore, one can not maintain replevin against another. This might be true so long as one remains a member of the association. As illustrating the view of the general laws upon the rights of the parties in property accumulated by the joint efforts of the original members, where there is an absence of any agreement among the members as to a dissolution, the following quotation is made from the note of Judge Freeman in the case of *Otto v. Journeymen Tailors' Protective and Benevolent Union*, 75 Cal. 308, 7 Am. St. pp. 156 and 168, 17 Pac. 217. "A member of such a voluntary association as one formed for social purposes, or the facilitation of business, has undoubtedly an interest in the general assets of the association so long as he remains a mem-

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ber: *In re St. James Club*, 2 De Gex, M. & G. 383, 387; 16 Jur. 1075, 1076; 13 Eng. L. and Eq. 589, 592; which is *prima facie* equal or proportionate: *McMahon v. Rauhr*, 47 N. Y. 67, 70; *Belton v. Hatch*, 109 N. Y. 593, 4 Am. St. 495; but, in the absence of any rule to the contrary, he has no severable or transmissible interest, or the right to any proportion of the assets upon ceasing to be a member, although upon dissolution a member would be entitled to share in the effects: *In re St. James' Club*, *McMahon v. Rauhr*, *Belton v. Hatch*, *supra*; *White v. Brownell*, 2 Daly, 329, 356; 4 Abb. Pr. N. S., 162, 191." In the same note in another connection, Judge Freeman says: "Again, the rights of different persons claiming to represent a subordinate lodge of an order are to be determined by the constitution of the grand lodge: *Chamberlain v. Lincoln*, 129 Mass. 70; and where the majority of the members of an incorporated benevolent lodge withdrew from the jurisdiction of the grand lodge and surrendered their charter, the minority who continued steadfast in their allegiance, and to whom the charter was again delivered, are entitled to the property of the lodge. *Altman v. Benz*, 27 N. J. Eq., 331; see also, *Smith v. Smith*, 3 Desaus, 557."

The Independent Order of Foresters is a mutual benefit society. We make the following quotations from Niblack on Mutual Benefit Societies, section 13, p. 16: "If a mutual benefit society be composed of separate bodies, whether co-ordinate or subordinate, the by-laws and rules of the society for the management of its internal affairs, and for the adjustment of the relations between its branches, constitute the law by which they should be governed. * * * The by-laws of a mutual benefit society are binding upon it and all its members." * * * Section 137, p. 158, "The true principle is, and upon

this view the apparent discordance in the cases may be nearly reconciled, that the law allows associates to imitate the organization and methods of corporations so far as their rights between themselves are involved, and will enforce their articles of agreement (nothing illegal or unconscientious appearing) as between the parties to them." Section 151, p. 175, "Where the society is organized for purposes other than profit, there may be property belonging to it, derived from the payment of dues or fines, or consisting of the furniture of its rooms, but the possession of such property is a mere incident, and not the main purpose or object of the society. A member has no severable proprietary interest in it, and no right to any proportionable part of it, either during the continuance of his membership, or upon his withdrawal. * * * It is well settled that where members have, contrary to the constitution and government of a voluntary society to which they belonged, severed their connection therewith, they cannot invoke the aid of a court of equity to take the property of the society from those who adhere to its organization, objects and government." Section 152, p. 177, "Where certain members of Teutonia Lodge, etc., withdrew from the jurisdiction of the grand lodge of the state, surrendered their charter and formed a new lodge, adopting the same name, and other members continued steadfast in their allegiance, and the charter was duly delivered to them as the lodge, that body which continued true to its allegiance and held the charter, was, as to certain property of the original lodge, taken by the members who withdrew, adjudged to be Teutonia Lodge, etc., and, as such, to be entitled to the property of the society." Citing *Altman v. Benz*, 27 N. J. Eq. 331.

Any member of a sub-court is bound by contract to the high court, the sub-court and each member to be

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governed by the constitution and by-laws of the order so far as they were not in conflict with the general laws of the land. Any member has a right to withdraw from the order, but in doing so he forfeits all interest in the property of the lodge. Section 2 of the constitution, under which the property in controversy was accumulated, provides that the High Court of the Independent Order of Foresters of the state of Illinois has original jurisdiction of all the courts organized under her authority. Section 7 of the constitution provides that such "high court does hereby order, establish and promulgate this constitution and these laws for its future government, and that of the subordinate courts under its jurisdiction and the members thereof." The second sub-division of section 1, article 11 of the constitution provides: "The high chief ranger shall, by virtue of his office, have full and complete authority over all subordinate courts, and the effects thereof, for the enforcement of the laws of the high court and the preservation of order in the said courts, and may, when he deems necessary, either in person or by deputy, take full charge of and direct the same; suspend or remove any officer or member for cause, demand and receive all papers, books, or effects of the court." Section 5, article 15 provides: "And said club shall be under the special supervision and control of the high chief ranger, who may, for cause, withdraw the authority here given and dissolve the club." Section 1, article 12, provides: "The moneys of this court are a trust fund for the benevolent purposes of the order, and the payment and necessary and proper expenses of the court, and shall not, under any pretense, be divided up among the members, or otherwise diverted from their legitimate use as aforesaid." Section 2, article 12, of the constitution provides: "Whenever a member of this court is suspended, dropped, or

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expelled, for any cause, or severs his connection by withdrawal, resignation, or otherwise, his right, title, and interest in or to any of the funds or property of this court hereby becomes extinguished and lost." Any member who seceded from the local court was charged with notice that he thereby renounced all title to the property accumulated by the local court.

Appellants' learned counsel further contend that by the act of secession the membership of Court Glueckauf No. 101 was reduced to less than fifteen, and by the laws of the order the lodge thereby ceased to exist. Section 1 of article 15 of the constitution is as follows: "Fifteen members of a club duly qualified as herein specified shall be necessary to form a new court and make application for a charter." Section 1 of article 18 reads: "Whenever a court forfeits its charter and becomes dissolved in consequence of the lack of the necessary number (15) of members, each remaining member then in good standing, who has paid all assessments to date of such dissolution, and against whom no charges of any kind are pending, or preferred, who desires to continue in membership in the order, and be entitled to the benefit of the endowment, may do so by filing with the high secretary, within thirty days from the date of such dissolution, a written notification of his desire and intention to that effect, over his own signature."

These two sections are relied upon by appellants to support their claim. Looking to the entire instrument herein, material parts of which we have set out, we are of the opinion that this position is not tenable. The local lodge was operated under the grand lodge, and the grand lodge had reserved the right through its high chief ranger to demand and receive all papers, when he deemed necessary. If the Court Glueckauf No. 101 became dissolved, the right to its effects, un-

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der the provisions of the constitution, vested in the supreme lodge, and it and not the defendants would be entitled to the property. The fact that the seceding members practically adopted the same name and had the same object in view, would not deprive the original lodge nor the grand lodge of any right.

We need not and do not decide that the reduction of the local lodge to a membership of less than fifteen does or does not of itself work a dissolution, but under such provision the supreme lodge would be authorized through its high chief ranger to claim the property. This right in the case before us was not exercised. The supreme lodge returned the charter and ever afterwards recognized Court Glueckauf No. 101 as the local order, and there was no legal lapse of which appellants can take advantage. Appellants, in having seceded, forfeited all right to or in any property of the lodge. The court committed no error. Judgment affirmed.

DENMAN v. WARFIELD, ADMINISTRATOR.

[No. 2,586. Filed October 6, 1898.]

APPEAL AND ERROR.—*Record*.—*Bill of Exceptions*.—The record must affirmatively show the filing of the bill of exceptions in the clerk's office; the recital of the filing in the bill itself is not sufficient.

From the Fountain Circuit Court. *Affirmed*.

Livengood, Livengood & Dice, for appellant.

Nebeker & Simms, for appellee.

HENLEY, C. J.—Appellee brought this action in the lower court against appellant by a complaint in three paragraphs upon three separate promissory notes, which are described in the complaint, and copies of the same filed therewith. To this complaint appellant filed an answer containing four paragraphs, the first of which is a general denial, the second a plea of pay-

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ment, the third that the notes in suit were given without any consideration, and the fourth paragraph of answer sets up in detail a settlement between appellant and appellee's decedent, by which the notes in suit were canceled. Appellee's demurrer to the fourth paragraph of answer was overruled, and he filed a reply denying the material allegations of appellant's answer. Upon the issues thus formed, the same was submitted to the court for trial without the intervention of a jury. By request of appellant the court found the facts specially, and stated its conclusions of law thereon, and rendered judgment in favor of appellee. Appellant filed a motion for a new trial, which was overruled. The errors assigned to this court are: (1) That the court erred in overruling appellant's motion for a new trial; (2) that the court erred in the conclusions of law stated upon the special findings of fact.

The special findings made by the court were as follows: "(1) The court finds that on the 5th day of November, 1872, the defendant executed to the plaintiff's intestate his note for ninety dollars; that the same was given for a valuable consideration, and has never been paid, and that there is now due on the same the sum of two hundred and nine dollars and twenty-five cents. (2) The court further finds that on the 19th day of January, 1884, the defendant executed his note to the plaintiff's intestate for the sum of two hundred and six dollars; that the same was given for a valuable consideration, which remains unpaid, and that there is now due on the same the sum of four hundred and eighteen dollars and fifty cents of principal and interest, and fifty dollars attorney's fees. (3) The court further finds that on the 10th day of February, 1883, the defendant executed his note to Nancy Denman for the sum of eighteen dollars; that Nancy Denman was the wife of plaintiff's intestate, Absalom J. Denman,

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and that she died in April, 1884, intestate, and that no letters of administration were taken out on the estate of said Nancy J. Denman. (4) The court further finds that the plaintiff's intestate died on the 28th day of June, 1896, and that the plaintiff was, in the month of August, 1896, duly appointed as administrator of his estate by this court, and that at the time of the bringing of this action the defendant was a non-resident of the State of Indiana, and was a resident of the state of Illinois. [Signed] Joseph M. Rabb, Judge." Upon the facts so found, the court stated as its conclusions of law that appellee was entitled to recover upon the two notes found to have been executed by appellant to appellee's intestate, in the sum of \$667.70, but that appellee was not entitled to recover on the note executed by appellant to Nancy Denman.

Appellant in his argument for the reversal of the judgment in this cause, depends entirely on the first specification of the assignment of errors, which raises the correctness of the ruling of the lower court in overruling appellant's motion for a new trial, and all questions discussed by counsel for appellant in their brief would require for their solution the presence of the evidence. Incorporated into the transcript is what purports to be a bill of exceptions containing the evidence, but there is no entry in the record indicating that the bill of exceptions was filed with the clerk. The cases in this State have uniformly held that the record must affirmatively show the filing of the bill of exceptions in the clerk's office, and that the recital of the filing in the bill itself is not sufficient. The simple manner in which it shall be done is also pointed out by statute. Acts 1897 p. 244. In the case of *Miller, Adm'r., v. Evansville, etc., R. R. Co.*, 143 Ind. 570, it was said by Jordan, J.: "Upon an examination we find that

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the record presents none of the questions discussed by counsel for appellant. Incorporated into the transcript are what purport to be two bills of exceptions, one embracing the evidence, and the other the instructions. Neither of these bills is properly before this court, for the reason that there is no entry independent of the bills themselves to indicate that either was filed. Section 629 R. S. 1881, renders it necessary to file the bill with the clerk of the trial court after it has been approved and signed by the judge. It is firmly settled by the decisions of this court that the transcript of the proceedings which comes to this court must affirmatively show, independent of the bill, that the latter was filed in the office of the clerk, and also the date of filing the same. *Board, etc., v. Huffman*, 134 Ind. 1; *Mason v. Brody*, 135 Ind. 582; *Prather v. Prather*, 139 Ind. 570; *Drake v. State*, 145 Ind. 210; *Elliott App. Proc.* section 805.

“An entry as recited in the transcript at the proper place, substantially as follows (to be varied to conform to the facts in each particular case) is most generally, and may be properly employed, to show the filing in vacation of the bill of exceptions and the date of filing thereof, to wit: Be it remembered that afterward, to wit: On the 30th day of October, 1895, the plaintiff (or defendant, as the case may be), filed in the clerk’s office the following bill of exceptions in words and figures as follows: The bill should then follow or appear as near as practicable, immediately after this recital. We merely suggest this in the hope that litigants who prosecute appeals to this court will at least endeavor to see that the record is so prepared as it will enable us to consider and decide upon their merits, the questions involved.” Also see to the same effect *Downey v. Head*, 138 Ind. 503; *Pittsburg, etc., R. W. Co. v. O’Brien*, 142 Ind. 218. The question here involved

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was also thoroughly discussed in strong and pertinent language by Justice McCabe, in the case of *Salem Bedford Stone Co. v. Hobbs, Admr.*, 144 Ind. 146. It is also argued by appellee's counsel that the motion for a new trial presents no question to this court, but, as the bill of exceptions is not in the record, for the reasons given, the judgment will have to be affirmed, and it is unnecessary to prolong this opinion by a discussion of other questions. Judgment affirmed.

NORRIS v. CHURCHILL.

[No. 2,587. Filed June 28, 1898. Rehearing denied Oct. 11, 1898.]

CONTRIBUTION.—*Bills and Notes.*—Five persons purchased a horse, each paying one-sixth of the purchase price thereof, the remaining one-sixth they borrowed from a bank upon their joint promissory note, payable on demand. Defendant, one of the joint makers, without the knowledge or consent of the other makers, paid to the bank one-fifth of the note, and the other makers, on the same day, gave their joint note, negotiable by the law merchant, for the remaining four-fifths of the debt, defendant not joining therein. Prior to the payment by defendant, two of the makers of the original note had become insolvent, and so continued thereafter. When the second note became due the makers thereof renewed it, and upon this note the bank sued, and obtained judgment against the makers thereof. Plaintiff, one of the makers, paid the judgment, and had it assigned to him. *Held*, that defendant was liable for his proportionate part of the amount paid by plaintiff in excess of his share of the debt. pp. 668-671.

NEW TRIAL.—*Causes.*—*Excessive Damages.*—A motion for a new trial on the ground that the damages assessed by the court are excessive can only be made in cases of tort. pp. 671, 672.

From the Rush Circuit Court. *Affirmed.*

W. A. Cullen, W. H. Martin, J. D. Megee and D. C. Justice, for appellant.

B. L. Smith, Claude Cambern and D. L. Smith, for appellee.

BLACK, J.—The appellee sued the appellant for contribution. They, with three others, jointly purchased

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a horse, each of the five purchasers paying one-sixth part of the price. The remaining one-sixth part of the purchase-money they borrowed from a bank upon their joint promissory note payable at said bank upon demand. The appellant, without the knowledge or consent of the appellee, paid to the bank the one-fifth part of the amount of the note in cash. The other makers thereof, on the same day, gave their joint promissory note, negotiable by the law merchant, to the bank for the balance, being four-fifths of the amount of the debt, the appellant not joining with the other makers in the execution of the latter note. Prior to the appellant's said payment of a part of the debt, two of the makers of the original note, Joseph T. Johnson and Owen Kincaid, had become insolvent, and they so continued thereafter. When the second note became due the makers thereof renewed it, and upon this third note the bank sued and recovered judgment thereon against the makers thereof. The appellee paid the judgment by giving his note negotiable by the law merchant to the bank, and the bank assigned the judgment to the appellee. The appellee thus paid all the original debt except the one-fifth part thereof so paid by the appellant. The five makers of the original note owned equal interests in the horse. When the makers of the original note borrowed the money for which it was given, they agreed between themselves that each should pay one-fifth of the amount borrowed.

The questions saved and presented in this court may be disposed of by deciding whether, upon such a state of facts, the appellee was entitled to contribution from the appellant.

It is contended, in effect, that as the appellant paid in cash his agreed share of the original note, and as the balance thereof was paid to the bank by the prom-

issory note, negotiable by the law merchant, of the other makers of the original note, the appellee could not acquire the right to contribution from the appellant by the appellee's final compulsory payment of the balance of the debt represented by the renewed promissory note, negotiable by the law merchant, given by the makers of the original note other than the appellant. Each of the makers of the joint obligation was principal as to his part, and co-surety for the others as to their respective parts. *Goodall v. Wentworth*, 20 Me. 322; *Bragg v. Patterson*, 85 Ala. 233, 4 South. 716. The right to contribution originated in equity, and is based upon natural justice. It applies to any relation, including that of joint contractors, where equity between the parties is equality of burden, and one of them discharges more than his share of the common obligation. *Bragg v. Patterson*, *supra*; *Aspinwall v. Sacchi*, 57 N. Y. 331; *Sexton v. Sexton*, 35 Ind. 88. Where a number of persons borrowed a sum jointly, but received different portions for their several uses, and one of the borrowers became insolvent, it was held that the others should contribute to pay his share, in proportion to the amount received by each. *Kincaid v. Hocker*, 7 J. J. Marsh. 333. In the case at bar the makers of the original joint note derived benefit equally from the proceeds of that note.

When there is an entire debt owed equally by several, the solvent debtors must share equally in any burden thrown upon them by the insolvency of a part of their number. *North v. Brace*, 30 Conn. 60, 72. Sureties who are insolvent are to be excluded in determining the proportions. See *Newton v. Pence*, 10 Ind. App. 672; *Michael v. Allbright*, 126 Ind. 172.

The agreement between the joint makers of the note that, as between themselves, they were to be bound to discharge the common obligation to the payee equally,

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each paying his equal share, would not relieve any one of them who had paid his ratable share from the equitable obligation to contribute to another of the joint makers who was compelled to pay more than his ratable share. Such a contract or understanding between the joint makers would not create a relation between them different from that which would exist by law by reason of the makers being bound by a common obligation; for, in such case, there is an implied contract that each will pay and discharge the common obligation equally. The obligation to make contribution is based upon an implied contract which exists from the date of the creation of the relation between the parties. The right is inchoate from that date. It becomes complete upon payment, but it relates back to the time the relation commenced out of which the right springs. *Nally v. Long*, 56 Md. 567; *Bragg v. Patterson*, *supra*; *Sexton v. Sexton*, *supra*. It is no defense to an action for contribution that the defendant has been released by the original creditor. *Clapp v. Rice*, 55 Gray, 557, 77 Am. Dec. 387.

The appellant had not performed his implied contract arising at the original creation of the joint debt. The suit for contribution was not based upon any note or judgment, but was founded upon that implied contract. Equity looks through mere forms to find the natural justice of the whole transaction. Two of the five original joint debtors being insolvent, and the appellee having been compelled to pay, in addition to his own share, the shares of these two insolvents, equity, which is equality, demanded that the debtors who were not insolvent should equally bear the burden of the shares of the insolvents so paid; that the appellant should reimburse the appellee to the extent of one-third of the amount which the latter had thus

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been compelled to pay in excess of his ratable share of the joint debt.

Counsel for appellee have suggested that no question as to the amount of the recovery was saved by the motion for a new trial, wherein it was assigned as cause, that "the damages assessed by the court are excessive," which is the fourth statutory cause, and can be properly assigned only in cases of tort. This suggestion is supported by decisions. *Lake Erie, etc., R. W. Co. v. Acres*, 108 Ind. 548; *Thomas v. Merry*, 113 Ind. 83, 91; *Western Assurance Co. v. Studebaker Bros. Mfg. Co.*, 124 Ind. 176, 182. The judgment is affirmed.

Henley, C. J., took no part in the consideration or decision of this cause.

THE CITY OF ALEXANDRIA ET AL. v. YOUNG.

[No. 2,366. Filed June 29, 1898. Rehearing denied Oct. 13, 1898.]

NEGLIGENCE.—Contributory Negligence.—*Complaint.*—A complaint against a city, a contractor who was engaged in constructing a water-works system therein, and the foreman, alleging that defendants constructed a deep ditch across one of the traveled streets of the city and left same unguarded, and that plaintiff, while carefully pursuing his way along the street after night, not knowing of such excavation, fell into same and was injured, sufficiently shows defendants' negligence and plaintiff's freedom from contributory negligence, and shows a joint liability on the part of defendants. pp. 674-677.

SPECIAL VERDICT.—Sufficiency.—The conclusion of negligence is not a question for the jury to find in a special verdict, and no error was committed in overruling a motion by defendant for judgment on the special verdict, in an action for damages, for the reason that there was no finding in the verdict that defendant was guilty of negligence. p. 677.

EVIDENCE.—Harmless Error.—In the trial of an action against a city, a contractor engaged in the construction of a system of water-works therein, and the foreman thereof, for damages on account of injuries received by plaintiff from falling into an excavation in a street, the admission in evidence of the proceedings between the city and the contractor leading up to the contract for the construc-

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tion of the water-works, and the contract and bond of contractor was harmless. p. 678.

SAME.—*Declarations Made by Plaintiff.*—Proof of declarations made by plaintiff in regard to his suffering after receiving an injury, and before the bringing of an action for damages therefor, is properly admitted in evidence in the trial of such action. p. 678.

NEW TRIAL.—*Newly Discovered Evidence.*—An application for a new trial based upon newly discovered evidence is properly refused where such evidence would be incompetent if objected to by the adverse party. pp. 679, 680.

From the Delaware Circuit Court. *Affirmed.*

R. S. Gregory, A. C. Silverburg, O. J. Lotz and Shannon & Rizer, for appellants.

James A. May, Joseph G. Leffler, Walter L. Ball and John E. Wiley, for appellee.

HENLEY, C. J.—The appellee was the plaintiff in the lower court, and prosecuted this action to recover damages resulting from an injury received by falling into an excavation or trench dug in a certain street in the city of Alexandria. The action was begun in the Madison Circuit Court, and in addition to the appellants, one Walter Fleming and the Alexandria Water-works were made defendants. The defendants separately demurred to the complaint, assigning as cause that the complaint did not state facts sufficient to constitute a cause of action. These demurrers were overruled, and the defendants each excepted to the ruling thereon. The defendants separately answered. These answers were each general denials, there being no other answers filed. The venue was changed to the Delaware Circuit Court, where there was a trial by jury and a special verdict returned, wherein appellee's damage was assessed at \$3,000.

Motions for judgment upon the special verdict were separately made by each party to the action. The motions of each of the appellants for judgment on the

special verdict were overruled. The separate motions of the defendants the Alexandria Water-works and Walter Fleming were sustained. The motion of appellee for judgment upon the special verdict against appellants was sustained. Appellants filed their joint and several motions for a new trial which was overruled, as was also the motion in arrest of judgment. Thereupon the court rendered judgment against appellants in the sum of \$3,000. Appellants have jointly and severally assigned error as follows: (1) Error in overruling appellants' demurrer to appellee's amended complaint. (2) Error in overruling appellant's motion for judgment upon the special verdict of the jury. (3) Error in sustaining appellee's motion for judgment upon the special verdict. (4) Error in overruling appellants' motion for a new trial. (5) Error in overruling appellants' motion in arrest of judgment.

Counsel for appellants, in their argument, first question the sufficiency of the complaint, which question was raised in the lower court by the separate demurrers of appellants directed thereto. The complaint alleges, that the Alexandria Water-works is a duly incorporated company under the laws of the State of Indiana; that the city of Alexandria is a duly incorporated city under the general laws of this State; that about the 1st of July, 1895, said city of Alexandria advertised for bids for the construction of a system of water-works for said city, and that the Seckner Contracting Company was one of the bidders for such work, and that said bid was duly accepted by the common council of said city of Alexandria. Appellant, the said Seckner Contracting Company, duly assented to said acceptance; that on the 13th day of August, 1895, the said city of Alexandria, by its common council, adopted an ordinance granting a franchise for the construction of said water-works system

to the Alexandria Water-works, which water-works were to be constructed in accordance with the plans and specifications on file in the city engineer's office; that the Alexandria Water-works duly accepted said franchise and all of the terms of the said ordinance, and on the 15th day of August, 1895, the said Alexandria Water-works and the appellant, the Seckner Contracting Company entered into a contract whereby the Seckner Contracting Company was to construct said water-works system and to give its bond to the said Alexandria Water-works for the faithful performance of such contract, and the Alexandria Water-works did, on the 25th day of August, 1895, assign said bond to the appellant, the said city of Alexandria, to secure the said city for the faithful construction of the said water-works system in accordance with the said plans and specifications; that on or about the 1st day of September, 1895, the appellant, the Seckner Contracting Company began work in the construction of the said water-works system, and about the same time entered into a contract with one Walter Fleming, whereby said Fleming was to oversee the construction of trenches and the laying of pipes needed and required in the construction of the said water-works system; that in the performance of the above contract the said Fleming constructed one of said trenches along and in Fairview avenue in said city of Alexandria, and also another short trench on the arm at or near the junction of Fairview avenue and Adams street, in said city; that said short trench or arm was about fifteen feet in length, and was a part of said water-works system, and said trench when completed, was of the depth of six feet and two inches, and of the width of about two and one-half feet, and lay immediately on and across that part of said Adams street which was most used for travel by pedestrians; that

said short trench or arm was left open and wholly unguarded on the evening and night of the 11th day of October, 1895, and that no light or guard of any kind was placed at said short trench on said night and evening, and that appellee fell into said trench on the night of the 11th day of October, 1895, and at the time he so fell into said trench he had no notice or knowledge whatever of the construction or the existence of the same, but was at the said time lawfully pursuing his journey along said Adams street, and the night being very dark and rainy, appellee was careful and cautious in pursuing his journey along said street at said time, and did everything to avoid an injury of any kind; that because of the said failure to have a light or guard of some kind at said trench, it having been left open and wholly unguarded, appellee had no means of knowing its location, or of guarding against falling into it, and because of said trench being so negligently left open and unguarded as aforesaid, appellee was accidentally and without fault on his part precipitated into said trench, wholly and entirely by the gross negligence of the defendants, and without any fault or negligence upon the part of the appellee; that the said Adams street is one of the principal streets of the said city of Alexandria, and is much traveled by the citizens of said city and by the public in general; that the appellants had notice of the excavation in time to have guarded the same before the accident occurred, and that the said city of Alexandria at all times retained the right to supervise and control the construction of said water-works system; and that by reason of said fall and precipitation into said trench, appellee was greatly injured and permanently disabled. Appellee then specifically states in his complaint the kind and nature of the injuries sustained by him, his ability

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to earn money prior to said injury, and demands damages in the sum of \$15,000.

The complaint distinctly avers that appellants constructed a deep ditch across one of the traveled streets of the city, and that in the night time appellee, while carefully pursuing his way along the street, unmindful of the danger, and not knowing of such excavation, fell into the same and received the injury for which damage is claimed. It is further averred that his said injury was caused wholly and entirely by the gross negligence of appellants; that the said trench or ditch was left open and unguarded by barriers in the night time, and "by means of said trench or arm being so negligently left open and unguarded, plaintiff (appellee) was accidentally and without fault on his part precipitated into said short trench or arm." Appellants' negligence and appellee's freedom from fault are, we think, sufficiently alleged in the complaint. The allegations of the complaint also show a joint liability on the part of appellants to this appellee. *Westfield Gas & Milling Co. v. Abernathy*, 8 Ind. App. 73.

It is next contended by counsel for appellants that the lower court erred in sustaining appellee's motion for judgment on the special verdict. The principal contention is that the verdict is insufficient to support the judgment because there is no finding therein that the appellants were guilty of negligence, and that the words "negligence" or "negligently" nowhere appear in the verdict.

The conclusion of negligence is not for the jury where a special verdict is returned. *Board, etc., v. Bonebrake*, 146 Ind. 317; *Louisville, etc., R. W. Co. v. Lynch*, 147 Ind. 165; *Louisville, etc., R. W. Co. v. Roberts*, 18 Ind. App. 538; *Conner v. Citizens' Street R. W. Co.*, 105 Ind. 62; *Indianapolis, etc., R. W. Co. v. Bush*, 101 Ind. 582; *Pittsburg, etc., R. R. Co. v.*

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Spencer, 98 Ind. 186; *Chicago, etc., R. W. Co. v. Burger*, 124 Ind. 275. The facts were placed before the court by the special verdict and were sufficient from which the court could conclude that appellants had neglected a duty which resulted in appellee's injury, and to which injury appellee did not contribute. This was sufficient to uphold the judgment of the court.

Appellants objected to the introduction of many matters of record of the proceedings of the city council of the city of Alexandria. These proceedings all related in some manner to the construction of the water-works plant in said city. The court also permitted appellee to introduce in evidence the bond given by appellant, the Seckner Contracting Company, to the Alexandria Water-works, and assigned to the city of Alexandria. The American Surety Company was the surety on this bond. We are unable to see how appellants could have been harmed by the introduction of any of this evidence. It simply put before the court and jury all of the proceedings leading up to the actual work of constructing the water-works plant, and its purpose was to inform the court and jury as to the relation which the various parties to this action bore to each other in such work of construction. A large part of this evidence might have been refused by the trial court because it was immaterial and was not necessary to establish any of the essential averments of appellee's complaint, but its admission was harmless and no reversible error can be predicated thereon.

The evidence of the witness William Houston, which is objected to by appellants, was, we think, properly admitted. This witness was permitted to testify as to the declarations and complaints of appellee made to witness in regard to appellee's suffering. It was said in the case of the *Carthage Turnpike*

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Co. v. Andrews, 102 Ind. 138: "Other witnesses were allowed to give the declarations and complaints of appellee to them in relation to his loss of sleep, appetite and taste, freezing in summer time, and sufferings in other respects. These declarations and complaints were made at various times from the receiving of the injury until the bringing of the action. They were not by way of narrations of past sufferings, but had reference to the times when made. This evidence, we think, was competent and proper. For whatever appellee may have suffered mentally or physically during the period from the injury, as well as for the permanent loss of health, he is entitled to recover, if he is entitled to recover at all. And, to show the extent of the suffering, his declarations and complaints at the time, or at any one time, are competent. How much weight should be given to such declarations is a question for the jury." See *Cleveland, etc., R. R. Co. v. Newell*, 104 Ind. 264; 1 Greenleaf Ev. section 102; *Town of Elkhart v. Ritter*, 66 Ind. 136; 1 Phillipps Ev. 180, 182.

The thirty-fifth cause assigned in the motion for a new trial is based upon newly discovered evidence, and is supported by the affidavit of a physician. In this affidavit it is made to appear that some five years prior to the happening of the accident by which appellee was injured, the said physician treated appellee for impotency, and that appellee's genital organs were at that time diseased. It is contended by appellants' counsel that this showing ought to entitle appellants to a new trial from the fact that \$1,000 is by the jury, in the special verdict specifically allowed as compensation for injuries sustained by appellee to his genital organs, by which he became impotent. Waiving all other objections, that might be made to the showing made by appellants under the cause, we are consider-

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ing, it is sufficient to say that the evidence of the physician, as appears from the affidavit made by him, would not be competent evidence upon the trial of this cause if objected to by appellee, and we cannot presume that appellee would not protect himself, upon another trial, from the introduction of incompetent evidence. The facts found by the special verdict were all within the material and competent evidence, and under these facts we cannot say that the judgment was excessive. We find no error in the record for which the cause should be reversed. Judgment affirmed.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILWAY
COMPANY v. DOES.

[No. 2,618. Filed October 14, 1898.]

RAILROADS.—*Fire Escaping from Right of Way.—Special Verdict.—Contributory Negligence.*—To authorize a judgment for plaintiff on a special verdict in an action against a railroad company for damages caused by fire escaping from its right of way to plaintiff's premises, the facts found must affirmatively show that plaintiff was without contributory fault. pp. 680-683.

SAME.—*Fire Escaping from Right of Way.—Contributory Negligence.—Interrogatory.*—An interrogatory and answer, in an action against a railroad company for damages caused by fire escaping from its right of way to plaintiff's premises, "Was not the loss of said property by fire without the fault or negligence of the plaintiff? Answer. Yes," is not sufficient to show plaintiff's freedom from contributory fault. p. 683.

From the Clark Circuit Court. *Reversed.*

Charles L. Jewett and Harry E. Jewett, for appellant.

Voigt & Stotsenburg and John W. Baldwin, for appellee.

COMSTOCK, J.—Appellee sued appellant to recover damages caused by a fire which it was alleged originated on the appellant's right of way, and was negli-

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gently permitted to communicate with appellee's land and there consumed certain hay, fence rails and other property of appellee.

The cause was put at issue, submitted to a jury, a special verdict returned, on which the court rendered a judgment in favor of appellee. Appellant assigns as error, (1) the sustaining of appellee's motion for judgment on the special verdict; (2) the overruling of appellant's motion for judgment; (3) in rendering judgment in favor of appellee; (4) in overruling appellant's motion for a new trial.

Appellant contends that there is no finding of facts showing that the appellee was free from contributory negligence. The verdict consists of interrogatories and answers thereto. To authorize a judgment in favor of appellee, the facts found must show affirmatively that he was without contributory fault.

In the case of the *Cleveland, etc., R. W. Co. v. Hadley*, 12 Ind. App. 516, the court by Reinhard, J., says: "It is not enough for the jury to state in their verdict that the injury was received by the plaintiff without his contributory negligence. Such a statement is but a conclusion or inference to be drawn from the ultimate facts of the case. It may be proper for the jury to find this inference when it has found the facts upon which it is predicated."

No citation of authorities is needed in support of the proposition that a special verdict should find only facts, and to entitle the party having the burden of the issue to a judgment all the facts must be found, and mere conclusions and matters of evidence will not serve the same purpose as the finding of facts.

In the very well considered case of *Wabash R. R. Co. v. Miller*, 18 Ind. App. 549 (an action for damages from a fire set out by a railroad company), the rights and obligations of the property owner are ably

discussed. Black, J., speaking for the court, says: "When, in such a case, the property owner had notice of the fire endangering his property to the loss for which he sues, if he could have prevented the loss by reasonable effort, and did not make such effort, or unless any attempt he could make and did not make to save his property after he discovered its danger, would be useless or extraordinarily hazardous or difficult, he cannot recover for such loss. * * * Where, as in this State, the burden rests upon the plaintiff to show his want of contributory negligence, it becomes necessary for him to show whether or not he or his servant in charge of the property had knowledge of the existence of the fire during its progress, and if it is not made to appear that such knowledge did not exist, then it devolves upon the plaintiff to show what efforts were made to save him from loss, and it is incumbent upon him to prove the use of efforts reasonable under the circumstances." Citing *Bevier v. Delaware, etc., Canal Co.*, 13 Hun 254; *Hogle v. New York, etc., R. R. Co.*, 28 Hun 363; *Eaton v. Oregon, etc., Navigation Co.*, 19 Or. 391, 24 Pac. 415; *Tilley v. St. Louis, etc., R. W. Co.*, 49 Ark. 535, 6 S. W. 8; *Louisville, etc., R. W. Co. v. Lockridge*, 93 Ind. 191; *Cleveland, etc., R. W. Co. v. Hadley, supra*; *Tien v. Louisville, etc., R. W. Co.*, 15 Ind. App. 304; *Louisville, etc., R. W. Co. v. Porter*, 16 Ind. App. 266; *Chicago, etc., R. R. Co. v. Bailey*, 19 Ind. App. 163. See also *Louisville, etc., R. W. Co. v. Carmon, ante*, 471.

In *Cleveland, etc., R. W. Co. v. Hadley, supra*, appellee sought to recover damages to his lands alleged to have been sustained by reason of appellant's alleged negligence. The court said "In the present case the finding fails to show where the appellee was or what he was doing at the time of the fire; whether he was present

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thereat or absent, and if present what he did to keep the fire from spreading, is not made to appear. The facts found are silent as to his whereabouts, * * * what efforts he or his family made to arrest the fire, and to prevent the burning of the property, and why they did not succeed therein is not made to appear. It cannot be presumed that the appellee was absent at such a time, or if he was present that he did all he could to prevent or lessen the injury. We think the verdict is fatally defective in this regard. It should have found the facts necessary to show that the appellee was free from fault. This it does not do. If the facts found were such as made it most probable that the appellee was absent, an express finding to that effect might not be necessary."

The only finding relative to the question of contributory negligence in the verdict under consideration is in answer to the following interrogatory: "Was not the loss of said property by fire without the fault or negligence of the plaintiff John P. Does?" Answer. "Yes." The verdict does not show where the appellee was, nor what he or anyone else did, if anything, at any time before or during the fire to protect his property.

As we have seen, the statement contained in interrogatory twenty-five, *supra*, and the answer thereto is not the finding of facts showing freedom from contributory fault. The verdict is fatally defective in failing to find the facts from which such a conclusion might be drawn. For this reason the trial court erred in sustaining appellee's motion for judgment on the special verdict. It is claimed by appellee's learned counsel that the evidence is not in the record. We do not deem it necessary to consider the questions presented by the motion for a new trial, as they may not occur again, and do not therefore determine whether

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or not the evidence is in the record. From a consideration of the entire verdict, we think justice demands a new trial. The judgment is therefore reversed, and the cause remanded for a new trial.

**BRODEN ET AL. v. THE THORPE BLOCK SAVING AND
LOAN ASSOCIATION ET AL.**

[No. 2,337. Filed May 13, 1898. Rehearing denied Nov. 15, 1898.]

PRACTICE.—*Marion Superior Court.*—*Appeal to General Term.*—*Appeal Bond.*—Where an appeal is taken from the special to the general term of the Marion Superior Court, and an affidavit is filed showing cause why an appeal bond should be filed, the court may in its discretion require the appellant to file a bond, and such action of the court is not reviewable on appeal to this court. *pp.* 687, 688.

COMPLAINT.—*Action on Appeal Bond.*—*Marion Superior Court.*—A complaint in an action on an appeal bond from the special to the general term of the Marion Superior Court, wherein appellant was defendant in an action to foreclose a mortgage, which alleges that appellant did not prosecute his appeal to effect and did not abide by and pay the judgment affirmed against him is sufficient. *p.* 688.

BONDS.—*Appeal from Special to General Term.*—*Defective Bond.*—A bond executed by appellant in an appeal from the special to the general term of the Marion Superior Court in a foreclosure proceeding upon the affidavit of the appellee as provided by section 1414, Burns' R. S. 1894, is a statutory bond, and not a common law undertaking, although the bond was not executed in strict accordance with the order of court made therefor, and the defects therein were cured by section 1235, Burns' R. S. 1894, providing that a bond given by an officer shall not be void for want of substance, recital, or condition, where such defect is suggested in the complaint on such bond. *pp.* 694-698.

PRACTICE.—*Appeal Bond.*—*Marion Superior Court.*—It is too late to object to a bond executed on appeal from the special to the general term of the Marion Superior Court in an action on such bond for the reason that the bond did not conform to the requirements of the order of the court, where the bond was approved by the court at the time of its execution. *p.* 697.

APPEAL AND ERROR.—*Bill of Exceptions.*—*Longhand Manuscript of Evidence.*—The longhand manuscript of the evidence must be filed in the clerk's office before being embodied in the bill of exceptions. *p.* 698.

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From the Marion Superior Court. *Affirmed.*

John W. Kern and Morris; Newberger & Curtiss,
for appellants.

Carter & Brown, for appellees.

WILEY, J.—The appellee, the Thorpe Block Saving and Loan Association, was the plaintiff below and the appellant Broden and Thomas Markey and the appellee Anna Markey, were defendants. The action was on an appeal bond given in an appeal from the special to the general term of the Marion Superior Court, in which bond Thomas and Anna Markey were principals, and Broden surety. Such proceedings were had as that final judgment was rendered against Broden and Thomas Markey, and in favor of Anna Markey.

Appellants' motion for a new trial was overruled, and the record which they have brought here presents only the sufficiency of the second paragraph of the complaint, and the second and third paragraphs of the separate answer of Broden to said second paragraph of complaint. The complaint was originally in three paragraphs, but a dismissal was entered as to the first and third. The appellant Thomas Markey has not assigned error in this court, and hence no question is presented in his behalf.

The second paragraph of complaint avers that the appellee association recovered a judgment in the special term of the Marion Superior Court against Thomas Markey, Peter Zeien and August Webber for \$9,301.55 and a decree of foreclosure against Thomas and Anna Markey and the other defendants; that the real estate embraced in said decree was owned by certain of said defendants, specifying the same in detail; that lot five, in Brown, Frank and Ketcham's subdivision, etc., as embraced in said mortgage was owned as follows: the undivided two-thirds thereof

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by Vinson Carter, trustee, and the undivided one-third thereof by Anna Markey; that said judgment was rendered March 24, 1894, and at that date Thomas and Anna Markey were, and when this action was commenced, still in possession of said lot five; that on March 28, 1894, said association caused a copy of said decree to issue and be placed in the hands of the sheriff for execution; that said sheriff advertised all of said property for sale, and set said sale for April 21, 1894; that after the issuing of a copy of said decree said Markey and Markey prayed an appeal to the general term of said court; that said association and said Vinson Carter filed an affidavit and motion showing cause and asking for an order requiring said Markey and Markey to file an appeal bond, in the penalty of \$3,000, conditioned that they should duly prosecute their appeal with effect, and should abide by and pay the judgment and costs which might be recovered or affirmed against them; that said appeal should not operate as a supersedeas to the enforcement of said decree as to any of the property except said lot five, claimed by said Markey and Markey; that said lot five was the only real estate embraced in said decree in which Markey and Markey had or claimed to have any interest; that on April 9, 1894, said Markey and Markey did file their appeal bond with appellant Broden as surety, which was approved, and the same was filed as an exhibit to the complaint; that on April 21, 1894, all of said property embraced in said decree was sold at sheriff's sale, except said lot five, and was purchased by said association for \$6,100, of which amount \$5,911.45 was credited on the judgment, and the residue to the payment of costs. That on account of said appeal bond, and because the same operated as a stay to the collection of said judgment, personally against the property of said judgment defendants Thomas

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Markey, Peter Zeien, and August Webber, said decree and execution, after said sale, was returned unsatisfied; that said bond operated as a stay to the sale of said lot five and the collection of said defendants personally until January 7, 1895, when such proceedings were had as that said judgment was in all things affirmed by the general term of said court, and that it remains in force and unappealed from. That thereafter a copy of said decree was duly issued to the sheriff of said county, and said lot five was sold by said sheriff by virtue thereof, and purchased by said association for \$1,800, of which amount \$1,740 was applied on said judgment, and the residue to the payment of costs, and that there is still due the sum of \$1,945. The complaint then avers that there was a defect in said bond in that it does not state that the personal judgment appealed from was rendered against defendants Thomas Markey, Peter Zeien, and August Webber, but instead states that the judgment was against Thomas Markey and Anna Markey and others; and also that said bond recites that said judgment was rendered March 24, 1895, instead of March 23, 1895, and for \$9,301.50 instead of \$9,301.55. The breach of said bond is averred to be that said Markey and Markey did not prosecute their appeal with effect, and have wholly failed to abide by and pay the judgment which was affirmed against them in said general term. To this complaint the appellant Broden demurred for want of sufficient facts, which demurrer was overruled, and such ruling is assigned as error. When these proceedings were had in the court below the statute provided for appeals from the special to the general term. So much of that statute as is applicable here is as follows: "And no bond shall be required in such case, unless it be shown by affidavit to be necessary for the protection of the rights of the

parties, in which case bonds shall be given with such conditions as may be directed by the court," etc. Section 1414, Burns' R. S. 1894.

In the case before us, an affidavit, as shown by the complaint, was filed, showing cause why an appeal bond should be filed, which in the judgment of the trial court presented sufficient reasons to require it to be done. Under the broad provisions of the statute above quoted, the court was clothed with large discretionary power, and its action in requiring the bond to be filed, and in fixing the conditions imposed, can not be reviewed here, unless there appears to have been a manifest abuse of such discretion. The facts averred do not show such abuse.

The learned counsel for appellant Broden, have not pointed out any defect in the complaint which in our opinion makes it bad, and have not cited us to any authorities in support of their contention.

The bond is conditioned that Markey and Markey shall "duly prosecute their appeal and abide by and pay the judgment and costs, which may be rendered or affirmed against them." The breach alleged is that they did not prosecute their appeal with effect, and have wholly failed to abide by and pay the judgment affirmed against them, etc. The court having directed the filing of the bond, it having been duly executed, and the complaint showing specific breaches of its conditions, we are unable to see wherein the complaint was defective. The court did not err therefore in overruling the demurrer.

In appellant Broden's second paragraph of answer, it is averred that the bond sued on was executed in the cause of the Thorpe Block Saving and Loan Association against Thomas Markey, Anna Markey, and others, praying judgment on a bond executed by Thomas Markey, Peter Zeien, and August Webber to

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said association for \$8,500 and interest, and also praying judgment of foreclosure of a mortgage, executed by said obligors and their respective wives, which mortgage included lot five as described in the complaint herein; that in said cause said Markey and Markey answered, admitting the execution of said bond and mortgage, and alleging that they were husband and wife, and owned said lot by the entirety, and claiming that said mortgage as to said lot was void; that the issues formed on this answer were the only issues between said association and said Markey and Markey. That in said action Vinson Carter filed a cross-complaint against said Markey and Markey, asking that his title to said lot be quieted, upon which cross-complaint issues were joined and tried between said Carter and said Markeys. The answer then sets out the proceedings in said cause, showing judgment against Markey, Zeien, and Webber; the foreclosure of the mortgage; that the title to said lot was quieted in said Carter, and that the motion for a new trial of Markey and Markey was overruled. It then avers the facts as to the issuing of the copy of the decree, the appeal by Markey and Markey, and sets out in full the affidavit of Carter, asking that an appeal bond be filed. The affidavit, omitting the formal parts, is as follows: "The above entitled action is one to foreclose a mortgage upon real estate in Marion county, Indiana; that the judgment herein is for the sum of \$9,301.55; that in addition to said judgment there are municipal assessments for street improvements and sprinkling against the mortgaged property amounting to about \$400; that there are taxes now due against said property amounting to \$133.61; that the costs of this suit, including the sheriff's sale of the property, will amount at least to \$100 more, making the total encumbrance

on said property about the sum of \$9,935.00; that said property is not now worth over the sum of \$9,300, and that there will in all probability, be a deficiency arising from the sale of said property to pay the judgment in this cause of from \$600 to \$1,000. That the defendant Thomas Markey is in possession of the property claimed by himself and wife, and that if he is permitted so to continue in possession, and the sale of said property is stayed pending an appeal in this cause, it will greatly prejudice the rights of the plaintiff and of the cross-complainant Vinson Carter, unless the said defendants Thomas Markey and Anna Markey are required to give a good and sufficient appeal bond." That upon the filing of said affidavit, the court made an order directing the bond to be filed, conditioned that Markey and Markey should duly prosecute their appeal with effect, and abide by and pay the judgment and costs which might be rendered or affirmed against them, "meaning thereby the aforesaid judgment of foreclosure against said lot five; and that they should pay all damages that might be sustained by said plaintiff and cross-complainant for the *mesne* profits, waste, or damage to the property claimed by the appellants, pending said appeal, meaning and intending said lot five; which said conditions, so directed, required, and were intended to require, a bond upon an appeal from the judgments of foreclosure, and quieting title, and appointing a receiver, as affecting said lot five, and no other or different bond whatsoever, and a bond upon no other or different appeal, or from no other or different judgment; and at the same time and in the same order, said court further ordered that said appeal should not operate as a supersedeas, as to any other judgment, or as to any judgment against any other person or as to any other property than said lot five. And this defendant

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avers that said appeal was from said judgments concerning said lot five, and none other, and did not affect in any way whatever any other judgment or decree in said cause, and particularly did not affect the personal judgment therein rendered against said Thomas Markey, Peter Zeien, and August Webber." That in pursuance to said order and direction of the court, the bond sued on was executed and approved by the court, and that no different or modified orders or directions as to the conditions of said bond than those heretofore set out were ever made, and the approval of the judge indorsed on said bond related only to said surety, and not to any conditions therein. That the conditions in said bond were materially and substantially different from the conditions directed by the court pursuant to statutory authority, in that it is payable to said association alone, and not to said association and cross-complainant Carter, or directed that it recites and is conditioned upon the payment of a judgment against Markey and Markey for \$9,301.55 when no such condition was directed, and such recital is false; that it contains no conditions for the payment of *mesne* profits, waste, or damage as directed by the court. That by reason of such variances, said bond was not the bond directed by the court, and is without binding force, and did not operate as a supersedeas. That notwithstanding such appeal, said association caused said decree to be executed as to all the property embraced therein, except said lot five, and that in fact execution upon personal judgment was not delayed by said appeal and bond, and the appellant was deprived of any opportunity to protect himself in such connection before any liability on his part for all or any part of said personal judgment was in any way asserted or claimed; all of which was done without his knowledge or consent, and though a residue of said judgment re-

mains unpaid, said association has not been damaged by said appeal.

The third paragraph of answer of the appellant Broden sets out all the substantial facts as they appear from the second paragraph, and concludes as follows: "That, as will more fully appear by reference to the copy of said bond exhibited with the complaint, the bond so executed and filed did not conform in its terms and conditions to said order, but recited a personal judgment against said Thomas and Anna Markey, is payable only to the plaintiff, and contains no condition for the payment of *mesne* profits, waste, or damage; that, if the same is of any binding force whatever, its obligation is upon the sole condition that said Thomas and Anna Markey shall pay and abide by the judgment rendered in favor of said plaintiff against them only, being the judgment of foreclosure against said lot five, and no other or different judgment. That said appeal and bond did not operate as a supersedeas upon said personal judgment against Thomas Markey, Peter Zeien, and August Webber, which was not in dispute and was not appealed from, and which was not against said Anna Markey; and this defendant did not obligate himself to pay the same or any part thereof, upon any condition whatsoever. That so construing said appeal bond, said plaintiff caused the decree then in the hands of said sheriff to be promptly executed, and caused all of the property therein described, except said lot five, to be sold by said sheriff, to wit: on the 21st day of April, 1894, and accepted, received, and receipted for the proceeds of said sale, to wit: the sum of \$6,100, less the sum of \$188.55, costs paid from such proceeds, and applied the same to the partial satisfaction of said personal judgment, and this defendant avers that said Thomas Markey, Peter Zeien, and August Webber, were then,

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ever since have been, and now are insolvent, and have no property whatever, subject to execution from which the unsatisfied residue of said judgment could or can be collected, and that, but for such insolvency and want of property, said judgment could and would have been collected long since, and the failure to collect the same was in no wise owing to said appeal or to said bond. That by said sale this defendant was deprived of any opportunity to protect his own interests by bidding at the same, as, for the construction so placed upon said bond, he would and could have done; that the year of redemption from the same had expired before any claim upon him was made of any liability for any residue of said judgment; and he, at all times, believed that the true and lawful condition of said bond was that the judgment against said lot five should be abided by. That said judgment against said Thomas and Anna Markey in favor of said plaintiff, namely, the judgment that the mortgage aforesaid be foreclosed upon said lot five, and that said lot be sold to satisfy the amount due, has been fully abided by, paid and performed as follows: At the request of said plaintiff a copy of the decree aforesaid was, to wit, on the 17th day of June, 1895, duly issued under the hand of the clerk and seal of this court to the sheriff of said Marion county who proceeded to and did execute the same against said lot five, and, after advertising the same in accordance with law, did, to wit, on the 13th day of July, 1895, expose and offer said lot five at public auction, and did strike off and sell the same to the plaintiff for the sum of \$1,800, and after deducting costs amounting to \$59.25, did pay the balance of said proceeds, to wit, the sum of \$1,740.75 to said plaintiff, who received and applied the same upon the judgment aforesaid; and though a residue of judgment re-

mains unpaid as in said complaint alleged, plaintiff has not been damaged by said appeal."

It seems evident to us that the complaint proceeds upon the theory that the appellee association, after exhausting the real estate embraced in its mortgage, was entitled, under the provisions of the bond, to recover in this action the unpaid balance of the original judgment, without regard to whether the appeal operated to the damage of the association or not. It is evident that it was not the intention of either of the parties or the court, that the bond should be liable for the entire judgment, for its penalty was fixed at only \$3,000, being more than \$6,000 less than the judgment.

As to the answer of Broden, we are at liberty to adopt the theory suggested by counsel for appellant. They say: "The theory of the second paragraph of answer, as we have heretofore explained it, is that the bond was given on an appeal from special to general term and was required to conform to the directions of the judge at the special term touching its conditions, and that it did not so conform, but varied in very important particulars, by reason whereof it is not a statutory, but a common law obligation, and, as a common law obligation of suretyship, amounted to a mere indemnity. Special damage is denied. The theory of the third paragraph of answer is, as heretofore explained, that the bond may be regarded as a statutory obligation, and, therefore, to be corrected upon the suggestion made in the complaint, but when so corrected, it is in accordance with the statute to be made "perfect in all respects," and consequently, to be made to read exactly as a proper bond in such case should read. Or to express it differently and possibly with more force and clearness, the second paragraph of answer seeks to set up facts to the effect that the bond was not the kind of bond directed to be filed

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by the court, and hence is of no effect unless as a common law bond to indemnify against actual damages resulting from the appeal; and that the third paragraph states facts showing that the bond should be so construed or corrected under the statute as to provide only for *mesne* profits and damages actually caused, or resulting from the appeal, and not so as to allow a recovery for the personal judgment from which no appeal was taken and upon which execution was not stayed.

It seems to us that the appellants' contention, that the bond must be construed as a common law bond, as for indemnity merely, cannot be maintained. At the time the bond was executed, there was an express statute authorizing and directing its execution.

Ordinarily an appeal from the special to the general term of the Marion Superior Court, operated as a supersedeas, or stay of execution, without any bond. Section 1414 Burns' R. S. 1894 (1361 Horner's R. S. 1897), is as follows. "It shall only be necessary for a party appealing from a special to the general term to pray an appeal to the general term, and it shall be granted as a matter of right, and no bond shall be required in such case, unless it be shown by affidavit to be necessary for the protection of the rights of parties, in which case bonds shall be given with such conditions as may be directed by the court; and such appeal shall stay the proceedings upon the action of the special term in the case, and in the manner that a stay of proceedings is allowed upon an appeal to the Supreme Court from the circuit court and none other."

Here the appellee association filed the affidavit required by the statute, and in the judgment of the trial court, such affidavit stated sufficient facts to warrant the court in ordering the filing of an appeal bond. The court, therefore, fixed the conditions of the bond,

and such conditions were that the bond should be in the penalty of \$3,000; that Markey and Markey should duly prosecute their appeal with effect, and pay any judgment that might be rendered or affirmed against them on such appeal.

Under the facts pleaded, we are inclined to the view, that the bond must be regarded as strictly statutory, and interpreted in the light and within the meaning of the statute. The affidavit filed, upon which the court directed the filing of the appeal bond, showed that after exhausting the property embraced in the mortgage, there would be a deficit of about \$1,000. Upon such showing, the court fixed the penalty of the bond at \$3,000, and, so far as the record shows, appellants made no objection to the amount of the bond, or the conditions imposed by the court. It further appears, so far as we are able to determine from the record, that the bond is in exact conformity to the order of the court.

Appellants were directed to file a bond in the penalty of \$3,000, conditioned that the Markeys would duly prosecute their appeal to effect, and pay any judgment that might be affirmed or rendered against them. The bond provides for this. At the time of the execution, a personal judgment had been rendered against Thomas Markey for \$9,301.55 and costs, and a judgment of foreclosure against both him and his wife. While others were personally liable with him, he was individually liable for the payment of any balance remaining unpaid after the sale of the mortgaged property, after the proceeds of such sale had been applied toward the extinguishment of the debt.

It seems evident, therefore, that in requiring the execution of the bond, both the court and parties intended that it should cover any part of the judgment which might be rendered or affirmed against

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them, not exceeding \$3,000, after the primary security should be exhausted. But if, as appellant contends, the bond was defective or varied in some minor particulars from the order requiring it, such variance or defects are cured by the express terms of the statute. Section 1235 Burns' R. S. 1894, (1221 Horner's R. S. 1897), is as follows: "No official bond entered into by any officer, nor any bond, recognizance, or written undertaking taken by any officer in the discharge of the duties of his office, shall be void for want of form or substance or recital or condition, nor the principal or surety be discharged; but the principal and the surety shall be bound by such bond, recognizance, or written undertaking to the full extent contemplated by the law requiring the same, and the sureties to the amount specified in the bond or recognizance. In all actions on a defective bond, recognizance, or written undertaking, the plaintiff or relator may suggest the defect in his complaint, and recover to the same extent as if such bond, recognizance, or written undertaking were perfect in all respects."

It has been held that this section applies to defective appeal bonds. *Railsback v. Greve*, 58 Ind. 72; *Corey v. Lugar*, 62 Ind. 60; *Opp v. Ten Eyck*, 99 Ind. 345; *Stults v. Zahn*, 117 Ind. 297. But more than this, the bond was approved by the court both as to its conditions and surety, and hence appellant's contention that the bond does not conform to the strict order of the court comes too late. See *Hyatt v. City of Washington*, ante, 148; *Griffin v. Wallace*, 66 Ind. 410; *Potter v. State, ex rel.*, 23 Ind. 550. The bond in suit was a statutory bond, for it was required to be given by a court empowered to make the order, and was taken in pursuance to a statute, and approved by an officer of the law.

In referring to the statute above quoted, Woods, J.,

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in *Opp v. Ten Eyck*, 99 Ind. 345, said: "The force and effect of this section is to cure defects and supply omissions in the class of bonds named, whether the defects and omissions be of form or substance, and to hold the obligors, both principals and sureties, to the full extent of the law requiring the bond. This is the plain interpretation, and so it has been often ruled." Many authorities are cited.

The case of *Smock v. Harrison*, 74 Ind. 348, was an action on an appeal bond given on an appeal from the special to the general term of the Marion Superior Court. The bond there was essentially the same as the one in the case at bar. It was conditioned that the appellants would duly prosecute their appeal and abide by and pay the judgment which should be rendered or affirmed against them. It was held that the amount due on the judgment was the measure of the recovery which could be had upon the bond. The case is directly in point here. Upon the same point see *Bitting v. Ten Eyck*, 85 Ind. 357, and *Opp v. Ten Eyck*, *supra*. The demurrer to the second and third paragraphs of answer was properly sustained. This disposes of every debatable question in the case.

In the former part of this opinion we stated that no question was presented in the overruling of the motion for a new trial, because the evidence is not in the record. Appellants concede this. The bill of exceptions was approved and signed by the trial judge September 3, 1896, and the record affirmatively shows that the longhand manuscript of the evidence was not filed in the clerk's office until the day following. The longhand manuscript of the evidence not having been filed in the clerk's office before it was embodied in the bill of exceptions, the evidence, under the repeated decisions, is not in the record. Judgment affirmed.

Comstock, J., not present.

The State v. Mathis.

WIESMAN v. GREEN.

[No. 2,474. Filed April 19, 1898.]

From the Scott Circuit Court. *Appeal dismissed.**C. B. Harrod, for appellant.**Geo. F. Lawrence, George V. Cain and Olin Bundy, for appellee.*

PER CURIAM.—The record in this case shows that the case was tried and a verdict returned on the 17th day of January, 1895, that on the 18th day of January, 1895 a motion for a new trial was filed and overruled, and judgment rendered, and on the same day an appeal bond filed. By the judge's certificate the bill of exceptions was presented to the judge March 19, 1897, and was signed by him April 23, 1897. The transcript was filed in this court May 25, 1897. The appeal is dismissed at appellant's costs.

THE STATE v. MATHIS.

[No. 2,509. Filed Dec. 14, 1897. Rehearing denied May 11, 1898.]

From the Warren Circuit Court. *Reversed.**W. A. Ketcham, Attorney-General, Thomas S. Cravens, Merrill Moores and James W. Brissey, for State.**J. Frank Hanley, Will R. Wood, R. P. Rhodes, Harley D. Billings and Robert Braden, for appellee.*

COMSTOCK, J.—This prosecution was instituted under sections numbered 3 and 10 of "an act to better regulate and restrict the sale of intoxicating, spirituous, vinous, and malt liquors," etc., approved March 11, 1895, Acts 1895, p. 248.

The indictment charges that, "on the 21st day of June, A. D., 1896, at and in the county of Warren and State of Indiana, Samuel B. Mathis, being then and there the owner and proprietor of a certain room situate on the town lot numbered 19, in Wm. Kent's addition to the town of Williamsport in said county and State, in which room, intoxicating liquors were then and there sold by said Mathis, under and by virtue of the laws of the United States, to be used and drunk as a beverage, and to persons not then and there holding a prescription from a reputable physician, did then and there unlawfully permit one William R. Marlatt, who was not then and there a member of his family, to go and enter into said room where said liquors were so sold as aforesaid, the day being the first day of the week, commonly called Sunday."

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The indictment was returned November 6, 1896. The court sustained defendant's motion to quash the indictment. The State appeals, and assigns as error the judgment of the court in sustaining said motion.

The questions presented are the same in principle considered and decided in *State v. Mathis*, 18 Ind. App. 608, and upon authority of that decision, the judgment of the trial court must be reversed. Judgment reversed, with the instructions to the trial court to overrule appellee's motion to quash the indictment and for further proceedings in the cause.

ON PETITION FOR REHEARING.

PER CURIAM.—Counsel for appellee in petition for a rehearing insist that "the only effect that permitting one not a member of the proprietor's family into his place of business at a prohibited time is to make that fact *prima facie* evidence of an illegal sale when he is charged with that offense. The fact standing alone that such a person was in the saloon at such a time is no offense." In this view we can not concur. The sale is prohibited. The presence of one not a member of the proprietor's family at stated times is also prohibited. Both are offenses. The question whether one may be convicted twice for the same offense is not before us, but the presence at a prohibited time of one in the place of business, not a member of the proprietor's family, is made an offense, and the offense is clearly charged in the indictment. Petition overruled.

PARKER LAND AND IMPROVEMENT COMPANY v. REDDICK.

[No. 2300. Filed Dec. 17, 1897. Rehearing denied May 12, 1898.]

From the Randolph Circuit Court. *Affirmed*.

J. W. Newton and G. H. Ward, for appellant.

Garland D. Williamson, for appellee.

ROBINSON, C. J.—The questions presented in this case are in all respects identical with those in the case of *Parker Land and Improvement Co. v. Reddick*, 18 Ind. App. 616. Upon the authority of the decision of that case the judgment is affirmed.

Wiley, J., dissents.

ON PETITION FOR REHEARING.

WILEY, J.—From the opinion of the majority of the court affirming the judgment below, I dissented, but did not express my views in a dissenting opinion. In my own mind, I thought then that the court reached a wrong conclusion, and, after a more deliberate consideration of the questions involved, I am more firmly convinced that I was

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correct in my original views, and that the court erred in its decision of the case.

Robinson, C. J., speaking for the court, said: "The questions presented in this case are in all respects identical with those in the case of *Parker Land and Improvement Co. v. Reddick*, 18 Ind. App. 616. Upon the authority of the decision in that case, the judgement is affirmed." In the decision of number 2,299 I did not take part, and, while I differ with my associates in the conclusion there reached, the principles there declared is now the law, so far as this court is concerned; and I have no inclination to refer to it further, only to show, if I can, the wide difference between it and the case I am now considering. Each of these cases were submitted to the court upon an agreed statement of facts. Among other facts, it was agreed in the former case that the appellant was the owner of a certain lot in its Woodlawn addition to Parker City, when it purchased of appellee the oil tank, for which, and the labor of its construction, appellee filed the notice of his intention to hold a mechanic's lien.

In the case I am now considering, among other facts, it was agreed that appellant, on the 18th day of January, 1896, held a lease upon certain described real estate; that appellee erected and placed thereon a two hundred and fifty barrel oil tank; that said oil tank was ordered of appellee by appellant on said 18th day of January, 1896; and that appellee, on March 11, 1896, filed his notice of intention to hold a lien thereon for labor and material in the construction of said tank. Upon the agreed facts, the court found for appellee, and rendered judgment accordingly. It was decreed that the real estate described in the notice and complaint, the drilling rig, complete, and the two hundred and fifty barrel oil tank recently erected thereon, etc., be sold as other lands are sold on execution, etc.

The agreed statement of facts, shows that on the 18th day of January, 1896, appellant had a lease on the real estate described in the notice and complaint. In the notice of appellee's intention to hold a mechanic's lien, the notice described the real estate, "a drilling rig, complete," and a two hundred and fifty barrel oil tank. The complaint avers, and the agreed facts show, that appellant was merely the lessee of the real estate described. The complaint further avers, and the agreed facts show the construction and erection of the tank.

In the notice of appellee's intention to hold a mechanic's lien three distinct classes, or articles of property, are described, to wit: (1) The real estate; (2) "the drilling rig, complete," and (3) the two hundred and fifty barrel oil tank.

In the agreed statement of facts no mention or agreement is made touching the "drilling rig, complete," yet the court in its finding and decree, directs that it be sold with the other property. In the case of the *Parker Land and Improvement Co. v. Reddick*, *supra*, the court

The Louisville, New Albany and Chicago R. W. Co. v. Elmore.

Jacob C. Heinz, Frederick J. Heinz, and Charles Horstmeyer as partners, the property in question had been seized by the sheriff, the appellant in the cause now before us, under a writ of attachment, as the property of the partnership. When so seized the property was in the possession of John R. Deitrich, the appellee, to whom it had been assigned by said Horstmeyer, one of said partners, in trust for the benefit of certain creditors of the firm.

The case at bar is the action of replevin mentioned in *Callahan v. Heinz*, ante, 359. In that case it was decided by this court that the assignment to the appellee was invalid. Adhering to that decision, we must hold that the evidence was insufficient. The judgment is reversed, and the cause is remanded for a new trial.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. ELMORE.

[No. 2,037. Filed June 4, 1897. Rehearing denied May 25, 1898.]

From the Montgomery Circuit Court. *Affirmed*.

E. C. Field, W. S. Kinnan and Thomas & Whittington, for appellant.

Jere West and Claude Thompson, for appellee.

BLACK, J.—The facts in this case, as shown by a special verdict within the averments of the complaint of the appellee against the appellant, stated very briefly, yet with sufficient distinctness to illustrate the legal principle involved, were, that a wreck of appellant's passenger train was caused by appellant's negligence, about which there is no question, near the city of Crawfordsville, and about two hundred feet from the appellee's house, where he resided with his family. A number of passengers, wounded in the wreck, were carried into appellee's dwelling by persons assisting them immediately after the accident. Whether the agents of the appellant carried or helped to carry them in does not appear. By reason of carrying the wounded passengers into his house the appellee's property was damaged, and some of his household goods and clothing and the clothing of his family were taken away and destroyed. The appellant had knowledge that appellee's property was being injured, carried away and destroyed. Its agents assisted in removing the wounded passengers from the house, and in carrying away appellee's property, consisting of beds, bedding, table linen, and wearing apparel, some portions of which were returned. Appellee's damages were assessed at forty dollars, for which amount the judgment was rendered.

The injury suffered by appellee was consequent upon the negligence

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of the appellant which caused the wreck. Can it be attributed to that negligence as a proximate result thereof?

The connection between the appellant's negligence and the appellee's injury, which would not have occurred but for such negligence, apparently was not broken; for the intervening event might in the natural and ordinary course of things have been anticipated as not improbable. The appellant, guilty of negligence which occasioned the wreck of a passenger train in such neighborhood, might well anticipate that such a consequence was reasonably possible to occur.

Where such a disaster occurs in proximity to such a place of shelter as that afforded by the appellee's dwelling house, the instinctive humane impulses of those who witness the suffering and peril of the injured passengers may be expected to occasion such an invasion of the convenient place of shelter, and in this instance the injury thus done to its owner, through the appropriation and use of his household goods and wearing apparel in caring for the wounded, so far as not trespass in which appellant's servants acting for the appellant in caring for the wounded participated, would seem to be a natural effect of a single wrong. See *Sher. & Red. Neg. secs. 26 et seq.*

However, the question whether the injury suffered by the appellee, or any part thereof, should be regarded as a proximate effect of the appellant's negligence whereby the wreck was caused, is not so presented as to require us to decide it. The record does not show a motion for a new trial, and no question is presented as to the amount of the recovery. What portion of the whole amount awarded was allowed for the carrying away of the appellee's property does not appear, but some part of the sum awarded was recoverable on this account. The judgment is affirmed.

CLARK CIVIL TOWNSHIP v. PEOPLE'S STATE BANK OF
OAKLAND CITY, INDIANA.

[No. 2,583. Filed June 15, 1898.]

From the Perry Circuit Court. *Affirmed.*

Sol. H. Esarey, for appellant.

Charles A. Weathers, for appellee.

HENLEY, C. J.—This cause involves the same questions as those considered and passed upon by this court in the case of *Clark School Township, etc., v. Grossius, ante*, 322. On the authority of that case the judgment in this cause is affirmed.

Center School Tp. v. State, ex rel. School City of Marion, Ind. et al.

CENTER SCHOOL TOWNSHIP v. STATE, EX REL. SCHOOL CITY OF MARION ET AL.

[No. 2559. Filed June 28, 1898.]

From the Grant Circuit Court. *Affirmed.**H. M. Elliott and G. M. Elliott*, for appellant.*William H. Carroll and Griffith D. Dean*, for appellees.

ROBINSON, J. — Appellee seeks to recover from appellant its *pro rata* share of the surplus dog fund over fifty dollars in the hands of appellant in March of the years 1892, 1893, 1894 and 1895. It is charged in the complaint that on the first Mondays of March in each of said years, the surplus dog fund over fifty dollars in the hands of appellant, was, for 1892, \$262.22; for 1893, \$451.84; for 1894, \$99.82; and for 1895, \$185.20; that a portion of said sum should have been distributed to appellee in proportion to its enumeration for school purposes, that appellant failed and refused to distribute any of said funds to appellee, but on the contrary expended all of said funds for the benefit of the schools of appellant, and that no part was received by appellee. Center School Township filed a demurrer to the complaint, which was overruled, and refusing to plead further, judgment was rendered in appellee's favor for \$1,101.75. This ruling is the only question presented.

Section 8654, Burns' R. S. 1894, provides that the revenue received from the tax on dogs shall be a fund for the payment of damages for sheep killed or maimed by dogs, and also provides, "That when it shall so happen on the first Monday of March in each year, in any township, that the said fund shall accumulate to an amount exceeding fifty dollars over and above orders drawn against the same, then the surplus over said sum of fifty dollars shall be expended by such trustee for the use of the school revenue of the township." In *Taggart, Aud., v. State, ex rel.*, 142 Ind. 668, it is held that by this proviso the township trustee is required to turn over to each school corporation within his township its *pro rata* share of such surplus in proportion to the enumeration of such school corporation.

It is argued by counsel for appellant that the complaint does not show that there is any money or fund on hand with which to pay such claim, but that it appears that the same had been expended by the trustee, that at the times complained of it was the law as declared by the Supreme Court that no part of said fund belonged to appellee, and that a more recent decision of the Supreme Court, made since the acts complained of, can not be given a retrospective effect so as to make such use of such fund wrongful. These questions have been

Hilligoss v. North Anderson Gas Company.

decided by the Supreme Court adversely to the position maintained by counsel for appellant in this case, in the recent case of *Center School Township v. State, ex rel.*, 150 Ind. 168. Upon the authority of that case the judgment in the case at bar must be affirmed. Judgment affirmed.

HILLIGOSS v. NORTH ANDERSON GAS COMPANY.

[No. 2,571. Filed October 4, 1898.]

From the Madison Circuit Court. *Affirmed.*

Floyd S. Ellison, for appellant.

M. A. Chipman, S. M. Keltner and E. E. Hendee, for appellee.

HENLEY, C. J.—In this cause we are asked to set aside the verdict of a jury, and hold that the trial court erred in overruling the motion for a new trial upon the sole ground that the verdict is not sustained by sufficient evidence. The evidence is properly before us. The verdict of the jury is not without some evidence to sustain it, and under the rule adopted by both this court and the Supreme Court of this State, the judgment of the lower court must be affirmed. Judgment affirmed.

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ASSIGNMENTS FOR BENEFIT OF CREDITORS—Cannot be made by one member of a partnership without the consent or ratification of the other members of the firm. See **PARTNERSHIP**; *Callahan v. Heinz*, 359.

The courts of this State will presume that a corporation appointed

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1. *Assignments by Nonresidents.*—Under the Kentucky statute, section 75, providing that a deed of assignment shall vest in the assignee the title to all the estate real and personal belonging to the assignor, the title of the assignee in the property assigned is not affected by the failure of the assignor to file a schedule of the property within five days as provided by statute.
Pittman, Assignee, v. Marquardt & Sons, 431.
2. *Assignments by Nonresidents.*—An assignment made in accordance with the law of the state where it is made affecting property in this State will be upheld where it is not contrary to the law or policy of this State. *Ib.*
3. *Fraud.—Conversion.—Sales.*—A purchase of goods by one who at the time of the purchase knew he was not able to pay for them, and intended not to pay for them, is such a fraud as will entitle the vendor to avoid the sale, although there was no fraudulent representation made, and an assignment of such goods for the benefit of creditors amounts to a conversion.
Peninsular Stove Co. v. Ellis, Assignee, 431.
4. *Conversion.*—An assignee for the benefit of creditors is not a purchaser for value as against a defrauded seller of the goods assigned, and the refusal of the assignee to surrender the goods to the seller amounts to a conversion. *Ib.*
5. *Assignments by Nonresidents.—Possession of Property.—Attachment.*—Where there is no provision in the law of the place where the assignment is made requiring anything but the deed of assignment to vest the title of the property assigned in the assignee, and this being by the law expressly declared sufficient, the possession of the property by the assignee, under the deed, was sufficient to protect him against a subsequent attachment.
Pitman, Assignee, v. Marquardt & Sons, 431.
6. *Failure to File Inventory.—Assignments by Nonresidents.*—The failure of an assignee to file an inventory within fifteen days after his appointment of all the estate that came into his hands as provided by the Kentucky statute, section 81, will not divest his title or right of possession as trustee to the property of the trust. *Ib.*
7. *Assignments by Nonresidents.—Conflict of Laws.—Amount of Exemption.*—A voluntary assignment made in another state, and valid under its laws, cannot be attacked in this State, by an attachment creditor of property situated in this State included in the trust, on the ground that the amount of exemption provided by the laws of the sister state is greater than that provided by the laws of this State. *Ib.*
8. *Assignments by Nonresidents.—Possession.—Attachment.*—Where an assignee in Kentucky, who was empowered by the deed of assignment to employ attorneys to assist in the settlement of the trust, sent his attorney to Indiana to take possession of a branch store belonging to the assignor, and the attorney arrived there the next day after the execution of the deed of assignment, and took possession of the stock of goods and caused the deed of assignment to be recorded in the county in which the property was situated, and then left the stock in the possession of the former manager of

the store, and posted a notice on the door stating that an assignment had been made, there was possession of the goods by assignee sufficient as against an attachment creditor who had notice of the assignment, although the attorney was employed prior to the execution of the deed of assignment but did not take possession of the goods until after the execution thereof. *Ib.*

9. *Assignments by Nonresidents.—Conflict of Laws.*—An attachment creditor cannot question the legality of an assignment made in Kentucky of property in Indiana, on the principle of conflict of laws, for the reason that the Indiana laws allow preference of creditors to be made in good faith, while the Kentucky laws do not, as the provision of the Kentucky law is in favor of the general creditor. *Ib.*

ATTACHMENT—Notice to nonresident of attachment and garnishment proceedings, see NOTICE, 1; *Redman v. Burgess*, 371.

1. *Bank Deposit.—Assignment for Benefit of Creditors.*—A general assignment for the benefit of creditors by a resident of another state, according to the law of such state, passes to the assignee title to a general deposit of money in a bank in this State, and such deposit cannot be attached by a creditor of assignor in this State. *Union Savings Bank and Trust Co. v. Indianapolis Lounge Co.*, 325.
2. *Personal Judgment.—Abandonment of Attachment Proceedings.*—The rendition of a personal judgment in an attachment proceeding without adjudication of the issue in attachment amounts to an abandonment of the attachment proceeding, and the judgment stands as though no attachment had been commenced.

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ATTORNEY AND CLIENT—Attorney's fees for defending an injunction suit may be recovered in an action on the bond, although the injunction was not the sole object of the action. See INJUNCTION; *Hyatt v. City of Washington*, 148.

BAGGAGE—See RAILROADS.

BANKS AND BANKING—See BILLS AND NOTES.

1. *Collections.—Default of Correspondent.*—A bank in accepting for collection a draft payable at a distant bank is only bound to the exercise of reasonable skill and ordinary diligence in selecting its correspondents and making the collection, and is not liable for the default of a correspondent, where due care was exercised in the selection of such correspondent. *Irwin v. Reeves Pulley Co.*, 101.
2. *General Deposits.*—A bank and a general depositor stand in the relation of debtor and creditor, and a general assignment for the benefit of creditors by such depositor does not transfer to his assignee the possession of the identical money deposited. *Union Savings Bank and Trust Co. v. Indianapolis Lounge Co.*, 325.

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The longhand manuscript of the evidence must be filed in the

clerk's office before being embodied in the bill of exceptions. See APPEAL AND ERROR, 6, 7, 8; *Broden v. Thorpe Block, etc., Ass'n*, 684; *Capital City Dairy Co. v. Plummer*, 408; *John Church Co. v. Spurrier*, 39.

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2. *Estoppel.*—A provision in a promissory note given in payment of machinery purchased, that the title to the property shall remain in the payees until the note is paid, will not preclude payees from showing, in an action on the note, that they were not the owners of the property. *Tinsley v. Fruits*, 534.
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8. *Drafts. — Acceptance. — Sales.*—A stock dealer bought a lot of cattle, sent them to a commission merchant for sale and drew a sight-draft on the commission merchant in payment for the

cattle as he had been in the habit of doing, being at the time indebted to the merchant for overdrafts previously made. The bank receiving the draft for collection gave the merchant notice thereof, and the merchant agreed to inform the bank in the afternoon of that day whether he would accept the draft. In the meantime the merchant sold the cattle, and after reimbursing himself from the proceeds of the sale for the amount due him for overdrafts, paid the balance to the holder of the draft and notified the bank that he would not accept the draft. *Held*, that the sale of the cattle with the knowledge of the draft, under the circumstances, did not amount to an acceptance of the draft, and that the commission merchant was not liable for the payment of the draft.

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1. *Sureties.—Delivery.*—Where a surety signed a bond on condition that the bond was not to be delivered until the other persons named in the body thereof should sign it, a delivery of the bond without their signatures will release such surety from liability.

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2. *Several Liability.*—A bond executed by the stockholders of a corporation to secure the directors thereof as sureties of the corporation, conditioned that any liability incurred should be in the proportion that the amount of stock held by each obligor bears to the whole amount of stock in force, created a several, and not a joint liability.

Ib.

3. *Injunction.—Obligees.*—Where the names of the mayor and marshal of a city were placed in a bond as obligees, filed in a suit against such city for an injunction, any rights under such bond would not accrue to such officers individually, but to them for the benefit of the city.

Hyatt v. City of Washington, 148.

4. *Names of Sureties in Body of Bond.—Injunction.*—The fact that the names of the sureties on a bond filed in a suit for an injunction did not appear in the body of the bond cannot be questioned on appeal, where the court approved the bond upon issuing the restraining order.

Ib.

5. *Appeal from Special to General Term.—Defective Bond.*—A bond executed by appellant in an appeal from the special to the general term of the Marion Superior Court in a foreclosure proceeding upon the affidavit of the appellee as provided by section 1414, Burns' R. S. 1894, is a statutory bond, and not a common law undertaking, although the bond was not executed in strict accordance with the order of court made therefor, and the defects therein were cured by section 1235, Burns' R. S. 1894, providing that a bond given by an officer shall not be void for want of substance, recital, or condition, where such defect is suggested in the complaint on such bond.

Broden v. Thorpe Block, etc., Ass'n, 684.

BREACH OF MARRIAGE PROMISE—See **MARRIAGE**.

Repudiation of Contract.—Action for Breach.—Before an action can be maintained for the breach of a marriage contract it must be alleged and proved that the contract has been repudiated, and such repudiation must be shown by the acts, words, or conduct of the party who so repudiates it, and to be without sufficient reason or cause. A mere request for a postponement of the marriage ceremony for reasonable cause does not amount to a repudiation or renunciation of such contract.

Walters v. Stockberger, 277.

BRIBERY—The defendant in an action to recover penalty for purchasing votes will be presumed to be innocent until such presumption is overcome by a preponderance of the evidence. See INSTRUCTIONS, 10; *Spurlin v. State, ex. rel.*, 342.

CARRIERS—See SHIPPING. A railroad company is the insurer of the safety of the baggage of a passenger until its arrival at place of destination. See RAILROADS, 3; *Indiana, etc., R. R. Co. v. Zilly*, 569.

When notice to the passenger of the arrival of his baggage is not necessary, see RAILROADS, 2; *Ib.*

When liability as common carrier ceases as to baggage, see RAILROADS, 1, 2, 3; *Ib.*

1. *Failure to Stop Train as Per Agreement.—Tort.—Costs.*—Where a railroad company agrees with a passenger to stop a train at a particular place, a failure to do so is a breach of duty which will support an action in tort. *Evansville, etc., R. R. Co. v. Wilson*, 5.
2. *Stopping Trains at Stations.—Rules of Company.—Duty of Passengers.*—In the absence of a statutory provision to the contrary, a railroad company may make rules providing that particular trains shall stop only at certain stations, when it furnishes reasonable means for reaching all stations on its road by some of its trains, and it is the duty of a passenger taking passage on a train to inform himself when, where, and how he may stop according to the regulations and time card of the railroad company, and if he make a mistake not induced by the company, he has no remedy against the company for its enforcement of such rule. *Ib.*
3. *Ticket May be Supplemented by Parol Agreement.*—The provisions of a railroad ticket may be supplemented by a special parol arrangement whereby the company agrees to stop its train at a place where it is not scheduled to stop. *Ib.*
4. *Railroads.—Violation of Bill of Lading.—Damages.—Parties.*—Where a consignor shipped a car load of merchandise with bill of lading containing the clause "with privilege of stopping over at Greensburg and Rushville, Ind.," the consignee thereof may maintain an action against the carrier for failure to stop at such points. *Tebbs v. Cleveland, etc., R. W. Co.*, 192.
5. *Rights of Consignee to Goods in Transit.*—The consignee of merchandise has the right to control it in transit. *Ib.*
6. *Damages for Breach of Condition in Bill of Lading.*—A complaint in an action against a railroad company for a breach of a condition in a bill of lading permitting a car load of bananas to be stopped at intermediate towns in transit, which alleges that plaintiff intended selling the bananas at the towns named in the permit; that they had a market value at such towns; that the bananas were shipped to meet the demands of the market at such towns, but by being taken further became unfit for use and valueless, and that by reason of such breach on the part of defendant, plaintiff lost the value which he would have received if the contract had been performed, states a good cause of action for damages. *Ib.*
7. *Seizure of Goods Under Legal Process.*—Where goods received by a common carrier and placed in a car for shipment were seized by an officer by virtue of a legal process issued in an action in attachment, without any fault or connivance on the part of the carrier, the carrier is not liable for its failure to deliver the goods entrusted to its care. *Indiana, etc., R. W. Co. v. Doremeyer*, 605.

CHATTEL MORTGAGES—See **MORTGAGES**.

An acknowledgment taken by the secretary of the corporation to whom the mortgage is given, who is also a stockholder thereof, is void. See **NOTARIES**; *Kothe v. Krag-Reynolds Co.*, 293.

Corporations.—*Acknowledgment by Officer of Corporation.*—*Notice.*—

The acknowledgment of a chattel mortgage by the secretary of the corporation to which the mortgage is executed, the secretary being also a stockholder in the corporation, does not entitle the mortgage to be recorded, and the record thereof does not constitute notice to subsequent lien holders. *Ib.*

CITIES—See **MUNICIPAL CORPORATIONS**.

Damages for Personal Injuries.—*Negligence.*—*Special Verdict.*—

Plaintiff brought suit for a personal injury received while walking along a board sidewalk. The jury found in the special verdict that the boards were from culled lumber and were nailed cross-wise on stringers; that plaintiff was walking along the sidewalk with her sister, carrying a babe in her arms, walking slowly and carefully, and observing the sidewalk as she proceeded; that she tripped on a loose board in the sidewalk by reason of her sister stepping on the other end thereof and fell, dislocating her thumb, elbow, and shoulder, and also injuring her back; that the boards had become loose by reason of the nails having rusted off, and had been loose for five months; that defendant could have discovered the defective condition of the sidewalk by inspection, and that plaintiff did not know that the walk was out of repair, and could not, by the use of ordinary care, have discovered that there were loose boards in the walk. *Held*, that the facts found by the special verdict were sufficient to support a judgment for plaintiff.

City of Columbia City v. Langohr, 395.

COMPLAINT—In action to foreclose assessment lien for street im-

provements, see **STREET IMPROVEMENTS**, 2; *Cleveland, etc.*, *R. W. Co. v. Edward C. Jones Co.*, 87.

In action before justice of the peace to recover premiums paid on an insurance policy, see **INSURANCE**, 13; *Metropolitan Life Ins. Co. v. Bowser*, 557.

In action against a married woman on her covenants of warranty in a deed of conveyance, see **MARRIED WOMEN**, 1; *Dickey v. Kalfsbeck*, 290.

Sufficiency of in action by personal representatives for the death of their decedent, caused by the wrongful act of defendant, see **DAMAGES**, 5; *Commercial Club v. Hilliker*, 239.

When cannot be assailed for first time on appeal on account of a defective averment, see **APPEAL AND ERROR**, 19; *Dickey v. Kalfsbeck*, 290.

The omission of a material averment cannot be cured by special finding. See **PLEADING**, 2; *Cleveland, etc.*, *R. W. Co. v. Edward C. Jones Co.*, 87.

1. **Action Against Sheriff.**—*Payment of Liens out of Order.*—A complaint against a sheriff to recover the surplus remaining from the sale of real estate under a foreclosure proceeding which alleged that plaintiff was the holder of a certificate of purchase of such real estate at a prior foreclosure sale thereof under a junior mortgage,

and that such surplus was paid to a judgment creditor whose lien was junior to plaintiff's lien, is not bad for failing to state the name of the owner of the land at the time of the decree of foreclosure of the junior mortgage, or the mortgagor, where it was alleged that certain parties named were defendants in such proceeding, and that plaintiff became the purchaser of the real estate at the sheriff's sale, and which also alleged that plaintiff was a party to the foreclosure of the senior mortgage, and that it was therein decreed that plaintiff held the next oldest lien on the real estate.

White v. Shirk, 589.

2. *Action on Appeal Bond.*—*Marion Superior Court.*—A complaint in an action on an appeal bond from the special to the general term of the Marion Superior Court, wherein appellant was defendant in an action to foreclose a mortgage, which alleges that appellant did not prosecute his appeal to effect and did not abide by and pay the judgment affirmed against him is sufficient.

Broden v. Thorpe Block, etc., Ass'n, 684.

COMPROMISE AND SETTLEMENT—

Construction of Agreement.—*Personal Injury.*—*Railroads.*—Where a railroad employe made a written proposition to the company in settlement of an injury sustained by him while in the employ of the company, containing a stipulation, "I am to remain in the service of said company as brakeman as long as I want to, providing my work shall prove satisfactory," and subsequently signed a release which the company's claim agent presented to him in which it was provided that he was to be employed "for such time only as may be satisfactory to said company," it will be presumed, in the absence of any showing of fraud or mistake, that claimant consented to such variance.

Phares v. Lake Shore, etc., R. W. Co., 54.

CONTRACTS—See NOVATION.

No particular form of words is necessary to constitute a marriage contract.

Walters v. Stockberger, 277.

1. *Construction.*—*Master and Servant.*—Where a railroad company in consideration of a release of liability for injuries sustained by an employe, agreed to re-employ him as a freight brakeman, he having been formerly employed as an extra freight brakeman, and he rendered services as such extra brakeman during the re-employment, the contract to re-employ is properly construed by considering the nature of the previous employment and the manner in which the parties treated the contract.

Phares v. Lake Shore, etc., R. W. Co., 54.

2. *Construction.*—*Extrinsic Evidence.*—Where it cannot be determined from a contract itself whether the parties intended a bailment or a sale, resort may be had to extrinsic evidence.

Leiter v. Emmons, 22.

3. *Construction.*—*Usage.*—Although usage cannot control an express contract, yet, where a contract is ambiguous, the presumption is that it was made with reference to known usage or general course of the particular business.

Ib.

4. *Consideration.*—A promise made to a person to induce him to perform an act which he is already legally bound to perform is without consideration, and is not binding on the promisor.

Spencer v. McLean, 626.

5. *Consideration.*—*Moral Obligation.*—The moral obligation of a purchaser of coal to protect the barges of the vendor from ice is a

sufficient consideration to support an express promise to protect the barges. *Pierce v. Walton*, 66.

6. *Consideration*.—Defendant purchased of plaintiff twenty barges of coal. Plaintiff shipped ten barges thereof and refused to ship the remainder unless defendant would protect the barges from the danger incident to the flow of ice. Defendant accepted the proposition, and agreed to the terms imposed. *Held*, that the promise to protect the barges was supported by a sufficient consideration. *Ib.*
7. *New Promise*.—Where plaintiff refuses to carry out his part of a contract unless certain changes are made therein, and defendant, instead of bringing an action for damages for its breach, agrees to the new terms imposed, and each of the parties act upon it, such agreement is binding upon defendant. *Ib.*
8. *Written Contract*.—*Oral Negotiations*.—Where a written contract is made covering the subject-matter involved, all oral negotiations leading up to it are merged in the written contract. *Tinsley v. Fruits*, 534.
9. *Ultra Vires*.—*Estoppel*.—An agent who negotiated the sale of school warrants to a building and loan association which inured to his sole benefit is estopped from denying the authority of such association to purchase the warrants in an action against him on his guaranty of such warrants. *Voris v. Star City Building and Loan Ass'n*, 630.
10. *Complaint*.—*Demand*.—A complaint for the price of certain wheat was based upon the following instrument: "Received of Lydia Emmons forty-two 85-60ths bush. wheat, in store, to be paid for on demand, in flour at 86 lbs. per bush., and twelve lbs. bran, subject to any loss by fire or otherwise." *Held*, that the complaint, to be good as against a demurrer, must allege a demand for payment in flour and bran. *Leiter v. Emmons*, 22.

CONTRIBUTION—

Bills and Notes.—Five persons purchased a horse, each paying one-sixth of the purchase price thereof, the remaining one-sixth they borrowed from a bank upon their joint promissory note, payable on demand. Defendant, one of the joint makers, without the knowledge or consent of the other makers, paid to the bank one-fifth of the note, and the other makers, on the same day, gave their joint note, negotiable by the law merchant, for the remaining four-fifths of the debt, defendant not joining therein. Prior to the payment by defendant, two of the makers of the original note had become insolvent, and so continued thereafter. When the second note became due the makers thereof renewed it, and upon this note the bank sued, and obtained judgment against the makers thereof. Plaintiff, one of the makers, paid the judgment, and had it assigned to him. *Held*, that defendant was liable for his proportionate part of the amount paid by plaintiff in excess of his share of the debt. *Norris v. Churchill*, 668.

CONTRIBUTORY NEGLIGENCE—See NEGLIGENCE.

This court will not weigh the evidence for the purpose of determining whether a party was guilty of contributory negligence.

See EVIDENCE, 3; *Louisville, etc., R. R. Co. v. Williams*, 576.

When Question for Jury.—When the facts are such that different conclusions may reasonably be drawn therefrom, the question of contributory negligence is one of fact for the determination of the jury under proper instructions from the court. *Ib.*

CONVERSION—An assignment for the benefit of creditors of goods which were obtained by fraud amounts to a conversion. See **ASSIGNMENTS FOR BENEFIT OF CREDITORS**, 8; *Peninsular Stove Co. v. Ellis, Assignee*, 491.

CORPORATIONS—A person dealing with a corporation is presumed to know the limitations of its authority, and is estopped from pleading its want of authority. See **ESTOPPEL**; *Voris v. Star City B'ld'g and Loan. Ass'n*, 630.

An acknowledgment of a chattel mortgage in favor of a corporation taken by the secretary thereof who is a stockholder is void. See **NOTARIES**; *Kothe v. Krag-Reynolds Co.*, 293.

Service of process on nonresident corporation, see **PROCESS**; *Rush v. Foos Mfg. Co.*, 515.

COSTS—

Action in Tort.—Recovery Less Than Fifty Dollars.—A motion to tax costs against plaintiff in an action against a railroad company for damages on account of failure to stop train as per agreement with passenger, for the reason that the verdict was for a less sum than fifty dollars is properly overruled.

Evansville, etc., R. R. Co. v. Wilson, 5.

COUNTY COMMISSIONERS—

Claim for Services Rendered During Quarantine against Small Pox.—

A complaint against the county based upon a claim filed with the county commissioners for services rendered as watchman during the time of quarantine against small pox, the certificate of the township trustee being attached thereto stating that the amount of the claim was due claimant out of the township fund of his township, and was presented and not paid for want of funds, shows no liability upon the part of the county. *Board, etc., v. Bader*, 339.

COURTS—See **MARION SUPERIOR COURT**.

Appointment of court stenographer, see **COURT STENOGRAPHER**; *Pitman, Assignee, v. Marquardt & Sons*, 431.

COURT STENOGRAPHER—

Appointment.—Presumption.—Where the record shows that the shorthand reporter was sworn to report the case, and it does not appear whether she was appointed on the court's own motion, or was employed by the parties, or either of them, and no objection to the reporter seems to have been made, it will be presumed on appeal that the action of the court was regular.

Pitman, Assignee, v. Marquardt & Sons, 431.

COVENANTS—See **DEEDS**.

1. *Breach Of.—Eviction.*—The covenants of warranty in a deed of conveyance is an assurance by the grantor that the grantee shall enjoy the same without interruption by virtue of a paramount title, and a recovery may be had for a breach of such warranty without actual eviction. *Beasley v. Phillips*, 182.

2. *Breach Of.—Complaint.—Answer.*—An answer to a complaint for a breach of covenants of warranty in a deed of conveyance admitting that defendant did not have title to a certain undivided interest in the real estate conveyed, but that both she and plaintiff knew of such fact at the time the conveyance was made, and that

an agreement was made relative thereto, is contradictory of the deed containing covenants of warranty, and does not constitute a defense to such cause of action. *Ib.*

8. *Breach Of.—Damages.—Measure Of.—Remote Grantor.*—In an action against a remote grantor for breach of covenants of warranty in a deed of conveyance, the measure of damages which plaintiff is entitled to recover is the amount he was compelled to pay to protect his title. *Ib.*

4. *Breach Of.—Deeds.—Remote Grantor.*—Covenants in a deed run with the land, and a grantee may sue a remote grantor for a breach of such covenants. *Ib.*

CRIMINAL LAW—Sufficiency of indictment for adultery, see ADULTERY; *Names v. State*, 168.

Affidavits to sustain causes assigned for a new trial must be brought into the record by bill of exceptions. *Ib.*

1. *Obstructing Highway.—Punishment.*—A fine of twenty-five dollars for obstructing a public highway is not excessive. *Hoch v. State*, 64.

2. *Appeal.—Bill of Exceptions.*—Under the provisions of section 1916, Burns' R. S. 1894, the bill of exceptions in a criminal cause must be made out and presented to the judge and filed within sixty days from the rendition of the judgment, and if not filed within such time it is not a part of the record on appeal, although ninety days' time was given by the trial court for the preparation thereof. *Ib.*

CUSTOMS AND USAGES—Evidence of custom and usage cannot vary the positive stipulations in a bill of lading. See SHIPPING, 1; *Louisville-Cincinnati Packet Co. v. Rogers*, 594.

Resort to in construction of ambiguous contract, see CONTRACTS, 8; *Leiter v. Emmons*, 22.

DAMAGES—For personal injuries received while traveling on defective sidewalk, see CITIES; *City of Columbia City v. Langohr*, 395.

For death of child, see PARENT AND CHILD, 1; *Baltimore, etc., R. W. Co. v. Bradford*, 348.

Demurrage is a proper element of damages in an action for injury to barges. See DEMURRAGE; *Pierce v. Walton*, 66.

Measure of damages for breach of covenants of warranty in deed of conveyance, see COVENANTS, 3; *Beasley v. Phillips*, 182.

Failure to stop goods in transit according to terms of bill of lading, see CARRIERS, 4; *Tebbs v. Cleveland, etc., R. W. Co.*, 192.

A motion for a new trial on account of excessive damages can be made only in actions in tort. See NEW TRIAL, 4; *Norris v. Churchill*, 668.

The Appellate Court will not reverse a judgment for failure to assess nominal damages. *Stewart v. Strong*, 44.

1. *Assessment.—Personal Injuries.—Peril of Life.*—The jury may take into account the peril of plaintiff's life at the time of the accident as an element of damages in the assessment of damages in an action for personal injuries.

Louisville, etc., R. R. Co. v. Williams, 576.

2. *Assessment.—Jury not Required to Itemize.—Practice.*—No error was committed in refusing to submit certain interrogatories to the jury inquiring concerning the several amounts allowed as separate items in the assessment of damages in an action for damages on account of personal injuries sustained by plaintiff while in the employ of defendant. *Keller v. Gaskill, 502.*
3. *Death by Wrongful Act.—Elements of Damages.*—Damages for bereavement, pain, or as a solatium are not recoverable in an action for death by wrongful act, the question is one solely of pecuniary loss. *Commercial Club v. Hilliker, Admr., 239.*
4. *Excessive Damages.—Death by Wrongful Act.*—A judgment in favor of the mother for \$2,750.00 for the death of her daughter by the wrongful act of defendant is excessive, where the daughter was married and lived with her husband, but contributed her personal earnings amounting to \$2.50 per week to the support of her mother. *Ib.*
5. *Death by Wrongful Act.—Complaint.—Beneficiaries.*—In an action by the personal representatives for damages for the death of their decedent caused by the wrongful act of another, brought under the provisions of section 285, Burns' R. S. 1894, an allegation that decedent leaves heirs and next of kin who are entitled to damages and who have been damaged is sufficient to permit the introduction of evidence to establish who the beneficiaries were. *Ib.*

DEATH—Where the question is in issue in an action on an insurance policy as to whether insured died from natural causes or committed suicide, the court will presume, in the absence of evidence, that he died from natural causes. See **INSURANCE**, 15; *Union Central Life Insurance Co. v. Hollowell, Admr., 150.*

DEATH BY WRONGFUL ACT—As to the proper elements of damages, see **DAMAGES**, 3; *Commercial Club v. Hilliker, 239.*

DECEDENTS' ESTATES—An administrator's report may be contested by exceptions filed thereto. *Swift, Admr., v. Harley, 614.* Payment by administrator, of mortgage assumed by decedent in purchase of real estate, see **EXECUTORS AND ADMINISTRATORS**, 2; *Ib.*

Witnesses.—Competency.—Practice.—Bills and Notes.—Loss of Note.—Section 506, Burns' R. S. 1894, makes adverse parties incompetent as witnesses in an action against a decedent's estate as to matters occurring during the lifetime of decedent, but under section 510, Burns' R. S. 1894 the court may in its discretion require any party to a suit to testify. No error was committed in permitting the wife of decedent, in an action by her against her deceased husband's estate, on a promissory note, to testify over objection as to the loss of the note in suit, such permission being an exception because of necessity, to prevent a failure of justice. *Schlemmer, Admr., v. Schendorf, 447.*

DEEDS—A recovery may be had for breach of warranty without actual eviction. See **COVENANTS**, 1; *Beasley v. Phillips, 182.*

Covenants in a deed run with the land, and a grantee may sue a remote grantor for a breach of such covenants. *Ib.*

Married women are liable on their covenants of warranty. See **MARRIED WOMEN**, 1; *Dickey v. Kalfsbeck, 290.*

A married woman is liable on her covenants of warranty in a deed of conveyance made in satisfaction of her husband's debts. See **MARRIED WOMEN**, 2; *Nichol v. Hays*, 369.

When purchaser of real estate will be estopped from disclaiming acceptance of deed containing a stipulation that the grantee assumed the payment of a mortgage existing thereon, see **MORTGAGES**, 8; *Fleming v. Reed, Admr.*, 462.

1. *An Easement in Land is an Encumbrance.*—An easement in real estate is an encumbrance, and the fact that the grantee thereof knew of the existence of an easement against land conveyed to him will not defeat his right to recover from grantor damages for the injury to such real estate by reason thereof. *Teague v. Whaley*, 26.
2. *Covenants of Warranty.—Breach Of.—Grantor Must Defend.—Damages.*—Where a grantee in a deed of conveyance of real estate is sued for possession, or where an encumbrance is sought to be enforced against the land, he may by giving proper notice to the grantor of the pendency of the suit, and requesting him to defend against the same, relieve himself of such defense and cast such duty upon the grantor; and if the grantor fails or refuses to defend, the grantee may do so, and recover from the grantor damages for the injury to the land, and costs of defending the suit, including attorney's fees. *Ib.*
3. *Covenants of Warranty.—Breach Of.—Notice.—Defense.*—Where a grantor of real estate with covenant of warranty, is not made a party to a suit by one having an easement therein, the grantee is required not only to notify him of the pendency of the suit in order to bind him by the judgment, he must also request him to defend the title. *Ib.*

DEMURRAGE—

Damages.—Demurrage is a proper element of damage for the consideration of the jury in an action for injury to barges.

Pierce v. Walton, 66.

DEMURRER—A demurrer to an answer for the reason that it "does not state facts sufficient to constitute a good answer to plaintiff's complaint" presents no question to the court.

City of Tell City v. Bielefeld, 1.

A demurrer addressed jointly to two or more paragraphs of answer should be overruled if either paragraph is good. *Ib.*

A demurrer to a plea in abatement cannot be carried back and sustained to the complaint. See **ABATEMENT**, 8; *Rush v. Foos Mfg. Co.*, 515.

EASEMENT—Is an encumbrance upon real estate, see **DEEDS**, 1; *Teague v. Whaley*, 26.

ELECTIONS—One made defendant in an action to recover penalty for bribery, under section 6325, Burns' R.S. 1894, will be presumed to be innocent until such presumption is overthrown by the preponderance of the evidence. See **INSTRUCTIONS**, 10; *Spurlin v. State, ex rel.*, 342.

ESTATES BY ENTIRETIES—As to assessment for the construction of free gravel road against land held by husband and wife

as tenants by entireties, see HUSBAND AND WIFE; *Humberd v. Collings*, 93.

ESTOPPEL—When purchaser of real estate will be estopped from disclaiming his acceptance of deed therefor in an action on mortgage thereon assumed in such purchase, see MORTGAGES 3; *Fleming v. Reed, Admr.*, 462.

One who negotiated the sale of school warrants to a building and loan association is estopped from denying the authority of the association to purchase same. See CONTRACTS, 9; *Voris v. Star City Bldg. and Loan Ass'n*, 630.

Corporations.—A person dealing with a corporation is presumed to know its powers and the limitations of its authority, and is estopped from pleading its want of authority. *Ib.*

EVIDENCE—See WITNESSES.

Where the evidence is conflicting the verdict of the jury will not be disturbed on appeal. *Perrin National Bank v. Thompson*, 649.

The constitution is the best evidence as to whether insured had the right to change beneficiaries in a life insurance policy. See PRACTICE, 11; *Masons' Union Life Ins. Ass'n v. Brockman*, 206.

The extent of a witness' knowledge of the subject-matter about which he testifies as to values goes to the weight of his testimony, and not to its competency. *Fox v. Cox*, 61.

How made part of record on appeal, see APPEAL AND ERROR, 6, 7, 8; *Broden v. Thorpe Block, etc., Ass'n*, 684; *Capital City Dairy Co. v. Plummer*, 408; *John Church Co. v. Spurrier*, 39.

1. The Appellate Court will not reverse a judgment on the evidence where there is evidence sustaining the judgment.

Heath, Admr., v. Carter, 83; *Hamilton v. Hanneman*, 16; *Fox v. Cox*, 61; *City of Columbia City v. Langohr*, 395; *Thomas' Estate v. Snyder*, 146.

2. **Weight Of.—New Trial.**—Where the evidence is conflicting, and there is some evidence to support the verdict, and the trial court has overruled a motion for a new trial asked because the verdict is not sustained by sufficient evidence, the action of the trial court is conclusive upon this court. *Bachman v. Cooper*, 173.

3. **Weight Of.—Contributory Negligence.**—The Appellate Court will not weigh the evidence for the purpose of determining whether or not the plaintiff in an action for damages on account of personal injuries was guilty of negligence contributing to her injury.

Louisville, etc., R. R. Co. v. Williams, 576.

4. **Reversal of Cause.**—Where there is no evidence to sustain the judgment the cause will be reversed.

Anderson Glass Co. v. Brakeman, 226.

5. **Admissibility.—Sales.**—In an action to replevin mill machinery, where both parties were claiming the property under a sale thereof, a deed purporting to convey the real estate and mill property in which was situated the machinery in dispute, and the record of the circuit court quieting the title to the same property were properly admitted in evidence as bearing on the question of the ownership of the property in dispute. *Fox v. Cox*, 61.

6. *Harmless Error*.—It is harmless error to refuse the admission of evidence tending to prove matters established by other uncontradicted evidence and shown to exist by the special findings.
Heath, Admr., v. Carter, 83.
7. *Declarations Made by Plaintiff*.—Proof of declarations made by plaintiff in regard to his suffering after receiving an injury, and before the bringing of an action for damages therefor, is properly admitted in evidence in the trial of such action.
City of Alexandria v. Young, 672.
8. *Receipt.—May Be Explained by Parol Evidence*.—A receipt which has none of the elements of a contract is only *prima facie* evidence of the statements it contains, and may be explained or contradicted by parol evidence.
Fox v. Cox, 61.
9. *Sales.—Statement of Parties at Time of Sale Part of Res Gestæ.—Replevin*.—In an action in replevin, where both parties claimed the property under a sale, and a receipt was introduced in evidence to show a sale to one of the parties, the statements of the parties made at the time the sale was made and the receipt was executed were competent evidence as a part of the *res gestæ*.
Ib.
10. *Harmless Error*.—In the trial of an action against a city, a contractor engaged in the construction of a system of water-works therein, and the foreman thereof, for damages on account of injuries received by plaintiff from falling into an excavation in a street, the admission in evidence of the proceedings between the city and the contractor leading up to the contract for the construction of the water-works, and the contract and bond of contractor was harmless.
City of Alexandria v. Young, 672.
11. *Bill of Exceptions*.—Where the longhand manuscript contains both oral and documentary evidence, and each item of documentary evidence shown to have been introduced is copied into the bill of exceptions immediately following the statement of its introduction, and the trial judge certifies that the bill contains all the evidence given in the cause, it is a sufficient showing that the bill of exceptions contains all the evidence, although the longhand manuscript by the statement and certificate of the official shorthand reporter purports to contain only a transcript of the shorthand report of the evidence.
Pitman, Assignee, v. Marquardt & Sons, 431.

EXECUTORS AND ADMINISTRATORS—

1. *Reports.—Exceptions*.—An administrator's report may be contested by exceptions filed thereto.
Swift, Admr., v. Harley, 614.
2. *Decedent's Estates.—Claims.—Mortgages*.—An administrator of a decedent's estate is properly credited in his report as such administrator with the amount of a mortgage assumed by decedent in his lifetime in the purchase of real estate, paid by such administrator, although the mortgage was not filed as a claim against the estate.
Ib.

EXPERT TESTIMONY—See WITNESSES.

FELLOW SERVANT—See MASTER AND SERVANT.

FIRES—As to damages for fires escaping from railroad right of way, see RAILROADS, 11, 12, 13, 14; *Baltimore, etc., R. W. Co. v. Does, 680; Louisville, etc., R. W. Co. v. Carmon, 471.*

FRAUD—A purchase of goods by one who at the time of the purchase knew he was not able to pay for them, and intended not to

pay for them, is such fraud as will entitle the vendor to avoid the sale, although no fraudulent representations were made. See ASSIGNMENTS FOR BENEFIT OF CREDITORS, 8; *Peninsular Store Co. v. Ellis, Assignee*, 491.

When collection of note will not be defeated on account of false representations made by the seller of the goods for which the note was given, see **BILLS AND NOTES**, 7; *Harness v. Horne*, 134. Where fraud is in issue the jury should find fraud as an ultimate fact. See **SPECIAL VERDICT**, 6; *Voris v. Star City Building and Loan Ass'n*, 630.

FRAUDS, STATUTE OF—

Sales.—School Warrants.—A verbal guaranty of the payment of school warrants by one negotiating the sale thereof is not made for the benefit of a third person in such sense as to bring the promise or guaranty within the statute of frauds, where the warrants were void, and known to the guarantor to be void, and the proceeds of the sale of such warrants inured to the sole benefit of the guarantor. *Voris v. Star City Bldg. and Loan Ass'n*, 630.

GAMING—

Wager.—Disaffirmance.—Recovery of Money in Hands of Stakeholder.—Either party to a wagering contract may disaffirm such contract before the determination of the event upon which the wager is laid, and may maintain an action against the stakeholder for the recovery of the money or property in his hands so wagered, after a demand made upon him for the surrender thereof. *Taylor v. Moore*, 654.

GARNISHMENT—See **ATTACHMENT**.

GRAVEL ROADS—Assessment for construction of against land held as an estate by entireties, see **HUSBAND AND WIFE**; *Humberd v. Collings*, 93.

HARMLESS ERROR—Overruling a demurrer to a defective answer is harmless where plaintiff was not injured thereby. See **PRACTICE**, 8; *Robinson & Co. v. Nipp*, 156.

It is harmless error to refuse the admission of evidence tending to prove matters established by other uncontradicted evidence. See **EVIDENCE**, 6; *Heath, Admr., v. Carter*, 83.

HIGHWAYS—A fine of twenty-five dollars for obstructing a public highway is not excessive. *Hoch v. State*, 64.

HUSBAND AND WIFE—A married woman is liable on her covenants of warranty in a deed of conveyance made in satisfaction of her husband's debts. See **MARRIED WOMEN**, 2; *Nichol v. Hays*, 369.

When advancement made to husband by wife's father does not create a trust in favor of the wife, see **TRUSTS**, 1; *Heath, Admr., v. Carter*, 83.

Tenants by Entireties.—Gravel Road Assessments.—Appeal by Husband.—Where an assessment for a free gravel road was made against lands held by husband and wife as tenants by entireties, and the husband alone appealed from such assessment to the circuit court, and was relieved therefrom by reason of irregularities in

the proceedings, such assessment cannot be enforced against the land or any part thereof by reason of the failure of the wife to join in the appeal. *Humberd v. Collings, 93.*

INJUNCTION—

Bond.—*Attorney's Fees.*—Attorney's fees for defending an injunction suit at the trial on the merits of the cause may be recovered in an action on the bond, although the injunction was not the sole object of the action. *Hyatt v. City of Washington, 148.*

INSTRUCTIONS—

1. *Life Insurance.*—*Contradictory Instructions.*—Where the court gives instructions which are contradictory and tend to mislead the jury, the judgment will be reversed. *Masons' Union Life Ins. Ass'n v. Brockman, 206.*
2. *Life Insurance.*—*Contradictory Instructions.*—An erroneous instruction is not cured by a correct instruction on the same matter which is contradictory of the erroneous one, it can only be cured by withdrawing it. *Ib.*
3. *Life Insurance.*—*Contradictory Instructions.*—The court erred in charging the jury in effect in one instruction, in the trial of an action on a life insurance policy, that they might construe the contract between the parties and determine whether certain answers of the insured to questions in the application amounted to warranties, and in another instruction informing the jury that such answers were warranties, and if any answer was untrue the warranty was broken, and the policy void, as such instructions were contradictory. *Ib.*
4. *Life Insurance.*—*Warranties.*—*Guaranty.*—An instruction to the jury in an action on a life insurance policy that "the word warranty means more than an agreement, it means a guaranty," is erroneous, as the words warranty and guaranty have different meanings. *Ib.*
5. *Life Insurance.*—*Construction of Contract.*—An instruction given to the jury in an action on a life insurance policy that "the word warranty means more than an agreement, it means a guaranty. Warranties are not favored in law and nothing can be construed as a warranty except that which was and is plainly and unequivocally declared to be such by the parties" is erroneous, as it gave the jury to understand that they had the right to construe the contract between the parties and determine whether the answers in the application amounted to warranties, where such answers were made warranties by the express terms of the contract. *Ib.*
6. *Incomplete Instruction.*—An instruction which undertakes to set out the material facts necessary to be proved in order to maintain an action or defense must be correct and complete. *Voris v. Shotts, 220.*
7. *Repetition of Instructions.*—Where a proposition of law is clearly and fully covered by an instruction it is not error to refuse an instruction covering the same proposition. *Hamilton v. Hanneman, 16.*
8. *Directing Verdict.*—It is within the province of the court to direct a verdict by instructions only where there is a total absence of evidence upon some essential issue, or where there is no conflict, and the evidence is susceptible of but one inference. *Ib.*
9. *Special Verdict.*—*Harmless Error.*—Where the jury is instructed to return a special verdict the giving of general instructions is harmless error. *Perrin National Bank v. Thompson, 649.*

10. *Elections.—Purchase of Votes.—Penalty.*—In the trial of an action to recover the penalty provided by sections 6825, *et seq.*, Burns' R. S. 1894, for purchasing or attempting to purchase votes at an election held pursuant to law, the court erred in refusing to instruct the jury that defendant was presumed to be innocent of the crime therein charged until such presumption was overthrown by the preponderance of the evidence. *Spurlin v. State, ex rel.*, 342.
11. *Contributory Negligence.—Railroads.—Damages.*—No error was committed in instructing the jury in the trial of an action against a railroad company for damages on account of personal injuries received at a railroad crossing, that the jury might take into consideration the failure of the defendant to sound the whistle and ring the bell as required by statute in determining the question of plaintiff's conduct before and at the time she approached the crossing, where the jury was also instructed that the negligence of the defendant in failing to give the statutory signals did not excuse plaintiff from the exercise of due care. *Louisville, etc., R. R. Co. v. Williams*, 576.
12. *Damages.—Permanent Injuries.—When Question of Fact.*—Where there was evidence from which the jury could have concluded that plaintiff's injuries were permanent, no error was committed in instructing the jury that in the assessment of damages they might determine whether or not the injuries were permanent, although there was no direct evidence that the injuries were of a permanent nature. *Ib.*
13. *Sales.—Principal and Agent.*—The court erred in instructing the jury in an action on a promissory note given for the purchase-price of certain machinery, that if the jury found that plaintiffs sold defendant the machinery in question that plaintiffs were estopped from denying that they were the owners of the machinery at the time of the sale, and that the jury should disregard any evidence tending to show that plaintiffs were not the owners thereof, where the theory of plaintiffs was that the machinery was the property of their principal, and that they sold same as agents of their principal. *Tinsley v. Fruits*, 534.
14. *When Not in Record.*—The Appellate Court cannot consider an alleged error of the trial court in failing properly to instruct the jury where the instructions given are not in the record. *Kessler v. Citizens' Street R. R. Co.*, 427.

INSURANCE—See MUTUAL BENEFIT ASSOCIATION.

As to proof of right of insured to change beneficiaries, see PRACTICE, 11; *Masons' Union Life Ins. Ass'n v. Brockman*, 206.

An instruction in an action on a life insurance policy that the jury had a right to construe the policy contract is erroneous. See INSTRUCTIONS, 5; *Ib.*

An instruction to the jury in an action on a life insurance policy that "the word warranty means more than an agreement, it means a guaranty" is erroneous. See INSTRUCTIONS, 4; *Ib.*

Township trustee may make reasonable expenditures from the special school revenue in procuring insurance on school property. See TOWNSHIP TRUSTEES, 2; *Clark School Tp. v. Home Ins., etc., Co.*, 543.

1. *Life Insurance.—Warranties.*—Warranties in an insurance policy are not favored in law. *Masons' Union Life Ins. Ass'n v. Brockman*, 206.

2. *Representations.—Warranties.*—The law regards representations made by the applicant in an application for insurance as a warranty to the insurer that the facts so stated are exactly as represented, and they must be literally true whether material or immaterial, or the policy is void.
Union Central Life Ins. Co. v. Hollowell, Admr., 150.
3. *Promissory Warranties.*—An agreement in an application for insurance to take an inventory of stock, and keep accounts of purchases and sales in an iron safe is a promissory warranty, and a failure to observe such agreement renders the policy voidable; if the company knows that such agreement is not being complied with, and takes no steps to forfeit the policy, it will not be heard, after a loss, to say that by reason of the failure to observe the agreement that the policy is void.
Hanover Fire Ins. Co. v. Dole, 333.
4. *Life Insurance.—Declarations of Insured.*—Statements or admissions made by insured are not admissible in evidence in an action on a policy of life insurance for the purpose of defeating the rights of the beneficiary. *Masons' Union Life Ins. Ass'n v. Brockman, 206.*
5. *Construction of Policy.—Forfeitures.—Warranties.*—In contracts of insurance all doubtful or ambiguous clauses will be construed with a view to prevent a forfeiture of the policy, and where a clause is capable of two constructions, one of which would work a forfeiture, and the other prevent a forfeiture, the court will adopt that construction which will prevent a forfeiture, and not a construction which imposes upon the assured the obligation of a warranty.
Hanover Fire Ins. Co. v. Dole, 333.
6. *Application.*—Where an applicant for insurance on the 24th day of August, 1895, stated in his application that he had taken an inventory of stock in March, 1895, and agreed therein to take an inventory once a year during the life of the policy, he was not thereby required to take an inventory in March, 1896, but had one year from the date of the policy in which to make such inventory.
Id.
7. *Life Insurance.—Ownership of Policy.*—Where an insurance policy is issued upon the life of one person for the benefit of another, and such beneficiary is named in the policy, it becomes the property of such beneficiary from the time it goes into force.
Masons' Union Life Ins. Ass'n v. Brockman, 206.
8. *Limitation of Power of Agents.—Waiver.*—A clause in a policy of insurance providing that no officer or agent of the company shall have any power to waive any provision or condition in the policy unless such waiver is in writing and attached thereto, may be itself waived by the insurer, either by express agreement or by the conduct of the company.
Hanover Fire Ins. Co. v. Dole, 333.
9. *Action to Recover Premiums Paid.*—An action to recover premiums paid on an insurance policy on the ground that the policy is void *ab initio* is not founded upon the policy.
Metropolitan Life Ins. Co. v. Bowser, 557.
10. *Return of Premiums.*—The question of the liability of an insurance company to return premiums paid on a policy of insurance depends upon whether there was a contract of insurance under which the risk was run by the insurer in favor of the insured.
Id.
11. *Action to Recover Premiums Paid.—Special Finding.*—A special finding in an action to recover premiums paid on an insurance

policy on the ground that such policy was void on account of the insured having failed to sign the application is not sufficient to sustain a judgment for plaintiff, where it is not found that the policy was void by reason of the application not being signed. *Ib.*

12. *Action to Recover Premiums Paid on Void Policy.*—Payments of premiums on a policy of insurance which is void *ab initio* are not regarded as voluntary, and are recoverable as money had and received to the plaintiff's use. *Ib.*

18. *Action to Recover Premiums Paid.—Complaint.—Sufficiency.*—A complaint in an action before a justice of the peace to recover premiums paid on a policy of insurance, on the ground that the policy was void in that the application was not signed by the person whose life was insured, was sufficient to apprise defendant of the nature of the claim and to bar another suit for the same cause, and was good against a demurrer, although it was not averred that there was any rule of the company requiring such signature. *Ib.*

14. *Life Insurance.—Payment of Premiums.—Special Findings.*—The payment of premiums is an ultimate fact which the jury has the right to find in an action on an insurance policy.

Union Central Life Ins. Co. v. Hollowell, Admr., 150.

15. *Life Insurance.—Suicide.—Presumptions.*—Where in an action on a life insurance policy the question is in issue as to whether the insured died from natural causes or committed suicide, the court will presume, in the absence of evidence, that he died from natural causes. *Ib.*

INTERROGATORIES TO JURY—The time during the trial in which the request for answers to interrogatories to the jury shall be made is largely within the discretion of the trial court. See PRACTICE, 13; *Bachman v. Cooper, 173.*

Objection to form of made for first time on appeal, see APPEAL AND ERROR, 21; *Baltimore, etc., R. R. Co. v. Amos, 378.*

Practice.—Interrogatories which are not so framed that the jury will be required to find one single fact in answering each are properly refused. *Union Central Life Ins. Co. v. Hollowell, Admr., 150.*

INTOXICATING LIQUORS—

Quart Shop Law.—Penalty.—The provision of section 2186, Burns' R. S. 1894, fixing a penalty of not more than \$200.00 nor less than \$5.00 for the transaction of any business or the performance of any act without license, when a license is required by any law of this State, applies to the act of March 8, 1897 (Acts 1897, p. 253), known as the Quart Shop Act in which no penalty is fixed for the violation of the provisions thereof. *State v. Buskirk, 496.*

JUDGMENTS—

1. *Joint Obligors.—Common Law Rule Not Changed.*—The common law rule that a judgment recovered against one of two joint debtors is a bar to an action against the other is not changed by sections 822, 823, Burns' R. S. 1894.

Capital City Dairy Co. v. Plummer, 408.

2. *Joint Obligors.*—Where the holder of a joint note sues a part of the joint obligors, and takes a judgment against them, the judgment merges the obligation, and bars a subsequent action against the other joint obligors; but by proceeding under section 822, Burns' R. S. 1894, he may take judgment against those served, and suggest upon the record the return of "Not found" as to those

not summoned, and then by proceeding under section 323, Burns' R. S. 1894, he may have the joint obligors not found bound by the judgment in the same manner as if they had all been before the court originally. *Ib.*

3. *Assignment*.—In order to pass the legal ownership of a judgment the assignment must be made as provided by statute, but an equitable ownership may be obtained without compliance with the statute giving the assignee a right to sue on the judgment. *Snell v. Maddux, 169.*

JUDICIAL SALES—See **SHERIFFS**.

Application of surplus arising from judicial sales, see **LIENS**; *White v. Shirk, 589.*

JURISDICTION—The Appellate Court has no jurisdiction of an appeal prosecuted against a party who died after the rendition of the judgment from which the appeal was taken and before the filing of the appeal in the Appellate Court. *Doble v. Brown, 12.*

JUSTICES OF THE PEACE—

Pleading.—The complaint in a civil action originating before a justice of the peace will be treated as sufficient upon demurrer thereto for want of facts upon appeal to the circuit court, if it contain enough to inform the defendant of the nature of the plaintiff's claim, and be so explicit that a judgment thereon will bar another suit for the same cause of action.

Metropolitan Life Ins. Co. v. Bowser, 557.

LAW OF CASE—When applied to subsequent pleadings therein, see **APPEAL AND ERROR**, 24; *Keller v. Gaskill, 502.*

LEASE—Title to rents after conveyance of real estate, see **NATURAL GAS**; *Chandler v. Pittsburg Plate Glass Co., 165.*

LIENS—

Priority.—*Satisfaction*.—*Sheriffs*.—Where the writ under which a sheriff made a sale of real estate contained notice that plaintiff's lien was second to that of the person for whom the sale was made, it was the duty of the sheriff to apply the surplus arising from the sale to the satisfaction of such lien without demand.

White v. Shirk, 589.

LIFE INSURANCE—See **INSURANCE**.

MARION SUPERIOR COURT—Appeal bond from special to general term, see **PRACTICE**, 21, 22; *Broden v. Thorpe Block, etc., Ass'n, 684.*

MARRIAGE—See **BREACH OF MARRIAGE PROMISE**.

Contract of Marriage.—No particular form of words is necessary to constitute a marriage contract. *Walters v. Stockberger, 277.*

MARRIED WOMEN—

1. *Deeds*.—*Covenants*.—*Breach Of*.—*Complaint*.—Married women are made liable upon their covenants of warranty in conveyances of their separate real estate by section 5118, R. S. 1881, and it is not necessary in a complaint to enforce such liability to plead the statute, or allege that the land conveyed was her separate property. *Dickey v. Kalfsbeck, 290.*

2. *Deeds*.—*Covenants*.—*Suretyship*.—A married woman who with her husband conveys her separate real estate by warranty deed in

satisfaction and payment of a debt owing by her husband to the grantee is liable on her covenants of warranty for a failure of the title to such real estate. *Nichol v. Hays*, 369.

MASTER AND SERVANT—See SPECIAL VERDICT.

Release of liability for injuries sustained by servant. See CONTRACTS, 1; *Phares v. Lake Shore, etc., R. W. Co.*, 54.

1. *Fellow Servant*.—*Vice Principal*.—Defendant's agent and foreman engaged in repairing and changing the poles of a telegraph line caused trenches to be dug along the sides of a number of poles for the purpose of moving them, and without any notice or warning to plaintiff, climbed one of the poles and loosed the wire connecting other poles therewith, one of which fell and struck plaintiff, who was engaged in digging a trench at the side thereof. Held, that the foreman was in the performance of a duty which he owed to the master, and was a fellow servant with all the others engaged in the common business, and that plaintiff could not recover of defendant for the injury thereby received.

American Tel., etc., Co. v. Bower, 32.

2. *Fellow Servant*.—The question whether or not the facts exist which make two or more employes fellow servants is a question of fact, but when such facts are found it becomes a question for the court to determine whether or not those facts bring the matter within the legal definition of a fellow servant.

Keller v. Gaskill, 502.

3. *Negligence*.—*Damages*.—*Special Verdict*.—*Sufficiency*.—A special verdict in an action by a section hand against a railroad company for damages for injuries sustained while breaking stone for defendant which finds that the handle of the hammer furnished him by defendant was made of a hickory pole with the bark on, and was worm-eaten and defective, and by reason of such defects broke and caused the hammer to glance and thus cause a piece of the stone to fly toward plaintiff and strike him in the eye, wounding the eye and destroying the sight, is sufficient to sustain a judgment for plaintiff.

Baltimore, etc., R. R. Co. v. Amos, 378.

MECHANIC'S LIEN—

May be Acquired on Oil Well.—A lien may be acquired on an oil well for labor performed and fuel furnished in drilling such well, under the provisions of section 7255, Burns' R. S. 1894.

Haskell v. Gallagher, 224.

MORTGAGES—See CHATTEL MORTGAGES.

1. *Sale of Mortgaged Chattels on Execution*.—*Liability of Officer*.—A constable who sells mortgaged chattels on an execution against the mortgagor, and delivers the same to the purchasers without requiring a compliance with the terms of the mortgage, is liable only for nominal damages, where the chattels were not removed from the county and were within a short distance of where the mortgagee lived. *State, ex rel., v. Bergner*, 390.
2. *Conveyance of Mortgaged Real Estate*.—*Assumption of Mortgage*.—*Liability*.—The fact that the owner of a portion of a tract of real estate did not appear and seek affirmative relief in a suit to foreclose a mortgage existing on the entire tract would not release the owner of the remaining portion thereof, who had assumed the payment of the mortgage, from liability to such owner for the violation of such agreement. *Fleming v. Reed, Admr.*, 462.
3. *Deeds*.—*Assumption of Mortgage*.—*Estoppel*.—Where a grantee of real estate went into possession of the real estate under a

deed of conveyance containing a stipulation that the grantee assumed, as part of the purchase-money, the payment of a mortgage existing thereon, and received the rents and profits thereof until the foreclosure of the mortgage, and until the year of redemption had expired, he will be estopped from disclaiming his acceptance of the deed. *Ib.*

4. *Conveyance of Mortgaged Real Estate.—Assumption of Mortgage.—Liability.*—Where a purchaser of a part of a tract of real estate assumed and agreed to pay a certain mortgage on the entire tract, the part conveyed became the primary security, and the grantee was thereby bound to protect the owner of the remaining portion thereof from loss by reason of the mortgage. *Ib.*

5. *Conveyance of Mortgaged Real Estate.—Assumption of Mortgage.*—Where a grantee of real estate by the terms of the deed assumed and agreed to pay, as a part of the purchase-money, a mortgage thereon, he thereby became the principal debtor for the debt so assumed, and the mortgagor, who was the grantor, became surety. *Ib.*

MUNICIPAL CORPORATIONS—See CITIES; STREET IMPROVEMENTS; STREETS.

A city cannot authorize the erection of scales in the street.

City of Tell City v. Bielefeld, 1.

Negligence.—A city is not liable for an injury sustained by a person caused by slipping upon a loose brick in the sidewalk which turned under her foot, where no defect was apparent in the sidewalk, and the city had no knowledge of the defect.

Bucher v. City of South Bend, 177.

MUTUAL BENEFIT ASSOCIATION—

Rights of Seceders to Lodge Property.—Where the majority of the members of a subordinate lodge withdraw from the jurisdiction of the grand lodge, the minority, who continue steadfast in their allegiance, and to whom the charter was again delivered, are, as between them and the seceding majority, entitled to the property of the lodge.

Ahlendorf v. Barkous, 656.

NATURAL GAS—See OIL.

Lease.—Title to Rents Accruing After Conveyance of Land.—Where an owner of land executes a gas lease and afterward conveys the land the grantee is entitled to the rents maturing after the conveyance.

Chandler v. Pittsburg Plate Glass Co., 165.

NEGLIGENCE—See MASTER AND SERVANT; RAILROADS; STREET RAILROADS.

When city is not liable for damages on account of defective sidewalk, see MUNICIPAL CORPORATIONS; *Bucher v. City of South Bend, 177.*

Contributory Negligence.—Complaint.—A complaint against a city, a contractor who was engaged in constructing a water-works system therein, and the foreman, alleging that defendants constructed a deep ditch across one of the traveled streets of the city and left same unguarded, and that plaintiff, while carefully pursuing his way along the street after night, not knowing of such excavation, fell into same and was injured, sufficiently shows defendants' negligence and plaintiff's freedom from contributory negligence, and shows a joint liability on the part of defendants.

City of Alexandria v. Young, 672.

NEW TRIAL—A motion for a new trial which depends upon the evidence cannot be considered on appeal where all of the evidence is not in the record. See *APPEAL AND ERROR*, 5; *Clapp v. Allen*, 263; *Kessler v. Citizens' Street R. R. Co.*, 427.

Where a trial court overrules a motion for a new trial asked because the verdict is not sustained by the evidence, the action of the trial court is conclusive upon this court where there is some evidence to support the verdict, *Bachman v. Cooper*, 173.

1. *Appeal and Error*.—*Record*.—A motion for a new trial must be sufficiently certain and specific to enable the court to identify the rulings without resort to any other part of the record.
Stout v. Harlem, Admr., 200.
2. *Ruling of Court on Pleadings*.—The rulings of the court on the pleadings are not causes for a new trial, and have no proper place in a motion therefor.
Hardison v. Mann, 404.
3. *Motion for*.—A motion for a new trial for the reasons that "the finding and judgment of the court is contrary to the evidence," and "the finding and judgment of the court is contrary to law," does not state a ground for a new trial under section 568, Burns' R. S. 1894.
Hubbs v. State, ex. rel. Kurtz, Tr., 181.
4. *Causes*.—*Excessive Damages*.—A motion for a new trial on the ground that the damages assessed by the court are excessive can only be made in cases of tort.
Norris v. Churchill, 668.
5. *Newly Discovered Evidence*.—An application for a new trial based upon newly discovered evidence is properly refused where such evidence would be incompetent if objected to by the adverse party.
City of Alexandria v. Young, 672.

NOTARIES—

Corporations.—*Acknowledgment Taken by Officer of Corporation*.—*Chattel Mortgage*.—An acknowledgment of a chattel mortgage given to a corporation, taken by the secretary thereof, who was also a stockholder of the corporation, is void under the provision of section 8041, Burns' R. S. 1894, although such corporation is not possessed of banking powers. *Kothe v. Krag-Reynolds Co.*, 293.

NOTICE—The record of a chattel mortgage given to a corporation, acknowledged by the secretary thereof, who was also a stockholder of the corporation, does not constitute notice to subsequent lien holders. See *CHATTEL MORTGAGES*; *Kothe v. Krag-Reynolds Co.*, 293.

1. *By Publication of Pendency of Action*.—*Attachment and Garnishment*.—It is not necessary that a notice by publication to a nonresident defendant of the pendency of an action for a breach of warranty, nor the affidavit on which the publication is based, should state that the demand was to be enforced by attachment and garnishment.
Redman v. Burgess, 371.
2. *By Publication of the Pendency of Action*.—*Contents of Notice*.—The third division of section 320, Burns R. S. 1894, providing for notice of the pendency of actions, states the various grounds disjunctively, making each ground a distinct cause, and it is only necessary that one of the grounds set out in the complaint be stated in the notice. *Id.*

NOVATION—

Evidence.—Novation is a new contract made with intent to ex-

tinguish a previous valid obligation and must be by mutual agreement of all the parties in interest; the old contract must be extinguished, and a new and valid contract made instead thereof.

Hill v. Warner, 309.

OFFICERS—See **SHERIFFS**.

Liability for sale of mortgaged chattels on execution, see **MORTGAGES**, 1; *State, ex rel. v. Bergner*, 390.

OIL—See **NATURAL GAS**.

A lien may be acquired on an oil well for labor performed and fuel furnished in drilling such well under the provisions of section 7255, Burns' R. S. 1894.

Haskell v. Gallagher, 224.

PARENT AND CHILD—

1. *Action for Death of Child*.—Section 267, Burns' R. S. 1894, gives to the father the right to maintain an action for the injury or death of his child. *Baltimore, etc., R. W. Co., v. Bradford*, 348.
2. *Enticing Child Away from Home*.—*Seduction*.—*Damages*.—*Proximate Cause*.—Defendant enticed plaintiff's minor daughter away from home, and, over plaintiff's objection, employed her to perform household duties in his home, where, without his knowledge, she was seduced by his son, and became pregnant with child. *Held*, that the damages sustained were remote, and not the proximate result of such wrongful employment. *Stewart v. Strong*, 44.

PARTIES—A codefendant who was not a party to the judgment is not a necessary party to an appeal from such judgment.

Anderson Glass Co. v. Brakeman, 226.

PARTNERSHIP—

Assignment for Benefit of Creditors.—*Cannot be Made by One Member of Firm*.—One member of a partnership cannot make an assignment for the benefit of creditors of the partnership property nor create a trust therein without the consent or ratification of the other members of the firm.

Callahan v. Heinz, 359.

PENALTIES—The penalty provided by the general statute, section 2186, Burns' R. S. 1894, applies to the act of 1897 (Acts 1897, p. 253) known as the Quart Shop Law, in which no penalty is fixed for the violation thereof. See **INTOXICATING LIQUORS**; *State v. Buskirk*, 496.

PLEADING—See **ABATEMENT**; **COMPLAINT**.

In actions before justices of the peace, see **JUSTICES OF THE PEACE**; *Metropolitan Life Ins. Co. v. Bowser*, 557.

1. *Theory*.—A pleading cannot perform the two-fold purpose of an answer in bar and also as asserting a cause of action. *Stout v. Harlem. Admr.*, 200.
2. *Complaint*.—*Omission of Material Averment*.—*Not Cured by Special Finding*.—Where a necessary and material averment is wholly omitted from a complaint, such defect cannot be cured by a special finding. *Cleveland, etc., R. W. Co. v. Edward C. Jones Co.*, 87.
3. *Natural Gas Lease*.—*Action on Lease*.—*Assignment of Lease*.—In an action on a natural gas lease against the assignee thereof for the recovery of the rentals under the terms of the lease the complaint is not bad for failing to set out a copy of the assignment. *Hardison v. Mann*, 404.

4. *Demurrer.—Form Of.*—A demurrer to an answer for the reason that it "does not state facts sufficient to constitute a good answer to plaintiff's complaint," presents no question to the court.
City of Tell City v. Bielefeld, 1.
5. *Demurrer.—Joint Demurrer.*—A demurrer addressed jointly to two or more paragraphs of answer should be overruled if either paragraph of answer is good. *Ib.*
6. *Counterclaim.*—A counterclaim filed by defendant in an action on a promissory note given for the purchase-money of machinery bought of plaintiff which alleges that the machinery did not do the work which it was warranted to do, and that defendant expended large sums of money in repairing same, is not bad for failing to aver that the machinery was worthless. *Tinsley v. Fruits, 534.*
7. *Answer.—Cross-Complaint.—Bills and Notes.*—The receiver of a bank sued a manufacturing company for balance due on a promissory note. Defendant by way of answer and by cross-complaint set up an agreement entered into by it and the president and cashier of the bank, by the terms of which defendant assigned to such president and cashier certain mill machinery and stock as collateral security for a debt owing by defendant to said president and cashier, and also to the bank, wherein it was agreed that the stock should be sold and the proceeds, after paying the operating expenses of the mill, be applied to the payment of the debts so secured, and the surplus returned to defendant, and alleged that the money received from such sale was in excess of the debts secured, and that the surplus was not returned to defendant, asking that the amount collected from such sale be first set off against the demand, and demanding judgment for the surplus. *Held*, that defendant's demand set forth in the answer and the cross-complaint was within the definition of a set-off as provided by section 851, Burns' R. S. 1894.
Paxton, Rec., v. Vincennes Mfg. Co., 253.

PLEA IN ABATEMENT—See ABATEMENT.

PRACTICE—A demurrer to a plea in abatement cannot be carried back and sustained to the complaint. See ABATEMENT, 8; *Rush v. Foos Mfg. Co., 515.*

A motion for judgment on a special verdict is not waived by filing a motion for a new trial before the ruling on the former motion.
Voris v. Star City Building and Loan Ass'n, 630.

Under the act of March 1, 1895, interrogatories must be so framed that the jury will be required to find one single fact in answering each. See INTERROGATORIES TO JURY; *Union Central Life Ins. Co. v. Hollowell, Admr., 150.*

A motion for a new trial on account of excessive damages can be made only in actions in tort. See NEW TRIAL, 4; *Norris v. Churchill, 668.*

Rulings of the court on pleadings are not causes for a new trial. See NEW TRIAL, 2; *Hardison v. Mann, 404.*

An administrator's report may be contested by exceptions filed thereto. *Swift, Admr., v. Harley, 614.*

Special findings may be made in the trial of exceptions to an administrator's report. See SPECIAL FINDINGS, 8; *Ib.*

As to discretion of court in permitting adverse parties to testify as

witnesses in an action against a decedent's estate, see DECEDENTS' ESTATES; *Schlemmer, Admr., v. Schendorf*, 447.

In an action for damages for personal injuries the jury may not be required to itemize the amounts allowed. See DAMAGES, 2; *Keller v. Gaskill*, 502.

1. *Appeals from Justices of the Peace.—Pleading.*—The rules of pleading before justices of the peace permitting all defenses to be made without plea, except the statute of limitations, set-off, matter in abatement, and the denial of the execution or the assignment of a written instrument, are applicable in the circuit court on appeal from justices, and no error was committed in sustaining a demurrer to paragraphs of answer setting up matters in defense not within such exceptions in a cause appealed from a justice of the peace. *Metropolitan Life Ins. Co. v. Bowser*, 557.
2. *Motion to Paragraph Complaint.*—Overruling a motion to require plaintiff to state different causes of actions in separate paragraphs of complaint is not available error. *Pierce v. Walton*, 66.
3. *Overruling Demurrer to Bad Answer.—Harmless Error.*—Available error cannot be predicated on the action of the court in overruling a demurrer to a defective answer where plaintiff was not injured by such defect. *Robinson & Co. v. Nipp*, 166.
4. *Intermediate Errors.*—Overruling a demurrer to a bad paragraph of answer is not reversible error, where it is shown from the findings that plaintiff did not fail to recover because of any defense set up in the answer, but because of failure to prove his complaint. *Haas v. City of Evansville*, 482.
5. *Amendment of Pleading During Trial.*—An amendment of the pleadings during the trial necessitates a reswearing of the jury only where the issues are changed by the amendment. *Smith & Stoughton Corporation v. Byers*, 51.
6. *Carrying Demurrer to Answer Back to Cross-Complaint.—Harmless Error.*—Error cannot be predicated upon the action of the court in overruling a demurrer to a cross-complaint, where a demurrer was afterward sustained to an answer to such cross-complaint, and carried back and sustained to the cross-complaint. *Stout v. Harlem, Admr.*, 200.
7. *Harmless Error.*—Error cannot be predicated upon the action of the court in sustaining a demurrer to a paragraph of complaint where the same facts were provable under another paragraph. *Hardison v. Mann*, 404.
8. *Amendment of Pleading During Trial.—Discretion of Court.*—It is within the discretion of the trial court to permit, upon the trial, the amendment of an answer, in the absence of a showing that the complaining party was misled or prejudiced thereby, and in what respect. *Smith & Stoughton Corporation v. Byers*, 51.
9. *Admission of Evidence.—Exception.—Appeal and Error.*—No error is committed in refusing an offer to prove a fact or facts where the offer embraces more and is of wider range than the question asked the witness. *Masons' Union Life Ins. Ass'n v. Brockman*, 206.
10. *Admission of Evidence.—Harmless Error.*—Error cannot be predicated upon the admission of improper evidence where the improper statements made by the witness were proved by undisputed certified records. *Snell v. Maddux*, 169.

11. *Evidence.—Life Insurance.*—A question propounded to a witness in an action on a life insurance policy as to whether under the constitution a member had the right to change the beneficiary in his policy is properly rejected, as the constitution itself is the best evidence of such fact.
Masons' Union Life Ins. Ass'n v. Brockman, 206.
12. *Harmless Error.—Examination of Witnesses.*—No reversible error is committed in sustaining an objection to a competent question, in the examination of a witness, where the witness afterwards answers substantially the same question. *Spencer v. McLean*, 626.
13. *Interrogatories to Jury.*—The time during the trial in which the request for answers to interrogatories to the jury shall be made is largely within the discretion of the trial court, and unless there is a clear abuse of discretion the action of the court will not be disturbed.
Bachman v. Cooper, 173.
14. *Motion to Dismiss.*—A motion by defendant to dismiss an action for the reason that the demand was paid off, is properly overruled.
Hubbs v. State, ex rel., Kurtz, Tr., 181.
15. *Exceptions to Conclusions of Law.—Special Finding.*—Exceptions to the conclusions of law upon the special finding of facts admit the truth of the facts found.
Indiana, etc., R. W. Co. v. Doremeyer, 605.
16. *Setting Aside General Verdict.*—Where the facts found by answers to interrogatories were entirely inconsistent with the general verdict, and such facts were sustained by the evidence, no error was committed by the trial court in disregarding the general verdict and rendering judgment on the answers to the interrogatories.
Bachman v. Cooper, 173.
17. *Venire De Novo.*—A written motion need not be made for a *venire de novo*.
Swift, Admr., v. Harley, 614.
18. *Venire De Novo.*—A *venire de novo* should be granted where a verdict or finding is so imperfect, ambiguous, or uncertain that it will not support a judgment. *Ib.*
19. *Contracts.—When Question for Jury.*—The question as to whether or not there was an agreement that a bond should not be delivered until signed by others was properly submitted to the jury, under proper instructions, where the evidence was conflicting.
Spencer v. McLean, 626.
20. *Joinder of Causes.—Parties.—Bills and Notes.*—The maker of a promissory note cannot by cross-complaint in an action against himself on such note cause one who has agreed with him for a valuable consideration to assume the payment of the note to be made a defendant, and in such action have judgment against him on his cross-complaint for the amount of the note under the provision of section 1226, Burns' R. S. 1894, that, "When any action is brought against two or more defendants upon a contract, any one or more of the defendants being surety for the others, the surety may upon written complaint to the court, cause the question of suretyship to be tried and determined upon the issue made by the parties at the trial of the cause or at any time before or after the trial, or at a subsequent term."
Hinkle v. Hinkle, 384.
21. *Appeal Bond.—Marion Superior Court.*—It is too late to object to a bond executed on appeal from the special to the general term of the Marion Superior Court in an action on such bond for the reason that the bond did not conform to the requirements of the order of the court, where the bond was approved by the court at the time of its execution. *Broden v. Thorpe Block, etc., Ass'n*, 634.

22. *Marion Superior Court.—Appeal to General Term.—Appeal Bond.*—Where an appeal is taken from the special to the general term of the Marion Superior Court, and an affidavit is filed showing cause why an appeal bond should be filed, the court may in its discretion require the appellant to file a bond, and such action of the court is not reviewable on appeal to this court. *Ib.*

PRINCIPAL AND AGENT—

Acts Not Within Scope of Agent's Authority.—When Principal Bound By.—The authority of an agent must proceed from his principal, and in ascertaining the extent of his authority the court will look to what has been expressly or impliedly authorized before the performance of the act of the agent in question, and to the action of the principal in adopting or rejecting such act; if the subsequent conduct may be explained and understood in a sense consistent with a previously existing limitation upon the agent's authority, such subsequent conduct cannot furnish, as against the principal, a foundation for an implication of extended authority by way of ratification of an unauthorized act. *Robinson & Co. v. Nipp*, 156.

PRINCIPAL AND SURETY—When extension of time of payment will release surety, see **BILLS AND NOTES**, 8; *Voris v. Shotts*, 230.

Where a surety signed a bond on condition that the bond was not to be delivered until other persons named in the body thereof should sign it, a delivery of the bond without their signatures will release the surety from liability. *Spencer v. McLean*, 626.

Where a grantee of real estate assumed as part of purchase-money a mortgage thereon, he became the principal debtor, and mortgagor, who was grantor, became surety. See **MORTGAGES**, 5; *Fleming v. Reed, Admr.*, 462.

A married woman is liable on her covenants of warranty in a deed of conveyance made in satisfaction of her husband's debts. See **MARRIED WOMEN**, 2; *Nichol v. Hays*, 369.

PROCESS—See **SUMMONS**.

Nonresident Corporations.—Jurisdiction.—Under the provisions of sections 818 and 816, Horner's R. S. 1897, the court acquires jurisdiction of a cause of action arising in this State against a foreign corporation doing business in this State, by service of process upon its superintendent who at the time was in this State as the agent and representative of the corporation, and engaged in the transaction of business for it, although a resident of another state.

Rush v. Foos Mfg Co., 515.

PROXIMATE CAUSE—The seduction of a girl by a son of defendant who had wrongfully enticed her away from her father's home and employed her to perform household duties was not the proximate result of such wrongful employment. See **PARENT AND CHILD**, 2; *Stewart v. Strong*, 44.

PUBLICATION—See **NOTICE**.

QUART SHOP LAW—The penalty provided in section 2186, Burns' R. S. 1894, applies to the act of 1897 (Acts 1897, p. 253) known as the Quart Shop Law. See **INTOXICATING LIQUORS**; *State v. Buskirk*, 496.

RAILROADS—See **CARRIERS**.

Rules as to stopping trains at stations, see **CARRIERS**, 2, 3; *Evansville, etc., R. R. Co. v. Wilson*, 5.

Violation of bill of lading in shipment of goods, see **CARRIERS**, 4; *Tebbs v. Cleveland, etc., R. W. Co.*, 192.

Failure of company to sound the whistle and ring bell at highway crossing as provided by statute, see **INSTRUCTIONS**, 11; *Louisville, etc., R. R. Co. v. Williams*, 576.

Where a railroad company agrees with a passenger to stop a train at a particular place a failure to do so is a breach of duty which will support an action in tort.

Evansville, etc., R. R. Co. v. Wilson, 5.

1. *Common Carrier.—Baggage.—Warehouseman.*—Where baggage is not called for within a reasonable time, it is the duty of the carrier to store it, and when this is done its liability as a carrier ceases, and that of warehouseman attaches.

Indiana, etc., R. R. Co. v. Zilly, 569.

2. *Common Carrier.—Baggage.*—Where a passenger is informed of the particular time of the arrival of his baggage, notice of its arrival is not necessary in order to relieve the carrier of its liability as a common carrier. *Ib.*

3. *Common Carrier.—Liability for Lost Baggage.*—A railroad company is the insurer of the baggage of a passenger until its arrival and discharge at the place of its destination, and until the owner has reasonable time and opportunity to claim it and remove it. *Ib.*

4. *Baggage.—Liability as Warehouseman.*—A railroad company is only bound to the exercise of ordinary care in storing and caring for unclaimed baggage. *Ib.*

5. *Personal Injuries.—Negligence.*—Plaintiff's intestate, while in the employ of a street contractor in loading gravel upon a wagon near defendant's railroad track where it had been deposited by defendant for such contractor, was struck by defendant's locomotive and cars which had ran off the track, and was fatally injured. The jury found that the locomotive was thrown from the track by reason of the accumulation of gravel thereon from unloading cars. It was also found that intestate was a farmer and had never worked about railroad tracks, and did not know that the track was in a dangerous condition. *Held*, that intestate was not guilty of such negligence contributing to his injury as to prevent a recovery. *St. Louis, etc., R. R. Co. v. Ridge, Admr.*, 547.

6. *Street Employee.—Negligence.*—An employee engaged in shoveling gravel for a street contractor at a place near the railroad track where it had been deposited by the railroad company has the right to assume that the track is in safe condition for the passage of trains and that he may pursue his work of shoveling gravel without danger of injury from the derailment of a passing locomotive through the accumulation of gravel upon the track. *Ib.*

7. *Trespasser on Track.—Children.*—A child two years of age is not by reason of its tender age prevented from becoming a trespasser upon a railroad track.

Baltimore and Ohio, etc., R. W. Co. v. Bradford, 348.

8. *Failure to Fence Track.—Injury to Child Wandering on Track.*—An action cannot be maintained against a railroad company

for damages for the death of a child which had wandered upon the railroad track by reason of the track not being fenced as provided by section 5323, Burns' R. S. 1894, where no negligence is charged other than the violation of such statute. *Ib.*

9. *Failure to Give Signals of Approach of Train.—Damage for Death of Child while on Track.*—The object of the statutory provision requiring signals to be given of the approach of a train to a highway crossing is to warn persons having the right to use the crossing of the approach of danger, and an action cannot be maintained against a railroad company based upon the failure to give such statutory signals for the death of a child which had wandered upon the track and was killed by a train of cars, where the child was a trespasser on the track. *Ib.*

10. *Damages for Lands Taken for Right of Way.—Complaint.*—A complaint in an action against a railroad company for the recovery of damages for lands taken for right of way without assessment of damages therefor as provided by statute, sections 905, 906, 909, R. S. 1881, is not bad for failing to aver any negotiation or attempt at an agreement between the parties before the beginning of the action. *Kennedy v. Cleveland, etc., R. W. Co., 315.*

11. *Fire Escaping from Right of Way.—Special Verdict.—Contributory Negligence.*—To authorize a judgment for plaintiff on a special verdict in an action against a railroad company for damages caused by fire escaping from its right of way to plaintiff's premises, the facts found must affirmatively show that plaintiff was without contributory fault. *Baltimore, etc., R. W. Co. v. Does, 680.*

12. *Fire Escaping from Right of Way.—Contributory Negligence.—Interrogatory.*—An interrogatory and answer, in an action against a railroad company for damages caused by fire escaping from its right of way to plaintiff's premises, "Was not the loss of said property by fire without the fault or negligence of the plaintiff? Answer. Yes," is not sufficient to show plaintiff's freedom from contributory fault. *Ib.*

13. *Fires Escaping from Right of Way.—Damages.—Special Verdict.*—A special verdict in an action against a railroad company for damages on account of fire escaping from its right of way to plaintiff's premises must show the negligence of defendant, and that the injury sustained by plaintiff was without his fault or negligence, and it must also show what plaintiff did to prevent the injury. *Louisville, etc., R. W. Co. v. Carmon, 471.*

14. *Fires Escaping from Right of Way.—Damages.—Special Verdict.—Interrogatories.—Passive Negligence.*—An interrogatory and answer in a special verdict in an action against a railroad company for damages on account of fire escaping from defendant's right of way to plaintiff's premises, "Did plaintiff do anything which in any way aided the spread of said fire from said right of way, or which in any way contributed toward the spread of said fire to his said lands? Ans. No." shows that plaintiff did nothing contributing to his injury, but does not show that he did not omit to do something which he should have done to prevent the injury. *Ib.*

RECEIPTS—When may be explained by parol evidence, see EVIDENCE, 8, 9; *Fox v. Cox, 61.*

REHEARING—Petition for rehearing, see APPEAL AND ERROR, 27; *Louisville, etc., R. W. Co. v. Carmon, 471.*

Questions not urged in argument before the decision will not be considered after a rehearing has been granted on other grounds.

Haas v. City of Evansville, 432.

A constitutional question cannot be raised upon a petition for a rehearing for the purpose of having the cause transferred to Supreme Court. See APPEAL AND ERROR, 28. *Ib.*

REPLEVIN—

1. *Demand*.—Where personal property is unlawfully taken it is not necessary to demand the return of the property before bringing an action in replevin. *Ahlendorf v. Barkous*, 656.

2. *Possession*.—*Special Verdict*.—Where the special verdict shows that defendants were not in possession of the property in question a judgment thereon in replevin is unwarranted.

Peninsular Stove Co. v. Ellis, Assignee, 491.

SALES—By insolvent company, see BILLS AND NOTES, 6; *Clapp v. Allen*, 263.

A purchase of goods by one who at the time of the purchase knew he was not able to pay for them, and intended not to pay for them, is such fraud as will entitle the vendor to avoid the sale, although no fraudulent representations were made. See ASSIGNMENTS FOR BENEFIT OF CREDITORS, 8; *Peninsular Stove Co. v. Ellis, Assignee*, 491.

Contracts.—**Orders**.—Plaintiff sued defendant for the value of a car load of spokes. It was found by the special verdict that plaintiff sold defendant a car load of spokes in 1895, and another in 1896, which were paid for. A short time after the latter sale plaintiff wrote defendant, "We have a car load of spokes on hand now. If you want them, send a man over and take them up, and we will pay his car fare to Ft. Wayne. Let us hear from you by return mail." Defendant replied, "Your favor of the 28th inst. is received, but, as we are chuck full of cheap spoke stock, we will not be able to use yours just now. We think, however, that we can do so after September 1st." About a month thereafter defendant wrote plaintiff that owing to a depression in business they would discontinue all purchases of wheel material "and will not accept any after September 1, 1896. If you have any stock manufactured upon our order, please deliver same before that date." *Held*, that the correspondence did not amount to a sale nor show that plaintiff had a standing order of sale.

Moody v. Standard Wheel Co., 422.

SEDUCTION—The seduction of a girl by the son of defendant who had enticed her from her father's home and employed her to perform household duties was not the proximate result of such wrongful employment. See PARENT AND CHILD, 2; *Stewart v. Strong*, 44.

SHERIFFS—

Foreclosure Sales.—**Misapplication of Surplus**.—Where the writ under which a sheriff's sale of real estate was made stated the name of the person holding the next oldest lien, the sheriff is liable on his official bond for the application of a surplus arising from such sale to another judgment lien junior to that of the person named in the writ.

White v. Shirk, 533.

SHIPPING—See **CARRIERS**.

1. *Carriers.—Bill of Lading.—Customs and Usages.—Contracts.*—Evidence of the custom and usage of trade is admissible in mercantile contracts for the purpose of showing the particular sense in which certain words used are intended, but such evidence cannot control or vary the positive stipulations in a bill of lading.

Louisville-Cincinnati Packet Co. v. Rogers, 594.

2. *Carriers.—Contracts.—Deviation.*—Where a consignor of goods contracted with the carrier to ship same on a certain named boat, and the carrier shipped the goods on another and different boat for the reason that the boat named was not then in port, such deviation constituted a violation of the contract, and the carrier cannot avail himself of a provision of the contract exempting him from liability for the loss of the goods by fire. *Ib.*

3. *Bill of Lading.—Deviation.—Loss of Goods.*—An averment in an answer to a complaint against a carrier for the value of certain goods destroyed by fire while being shipped in another and different boat from that specified in the bill of lading, that the goods would have been destroyed if left in the wharf-boat to await the arrival in port of the boat to which the goods were consigned, as that part of the wharf-boat in which the goods would have been stored was also destroyed by fire, is a conclusion. *Ib.*

4. *Delivery of Goods.—Waiver of Condition in Bill of Lading.*—The delivery of goods by consignor's agent to a boat belonging to a packet company other than that named in the bill of lading would not of itself constitute a waiver of the condition in the bill of lading that the goods were to be shipped by a certain boat therein named. *Ib.*

5. *Delivery of Goods.—Rescission of Contract.—Pleading.*—The delivery of goods by the consignor thereof at the wharf-boat of a packet line to a clerk of another and different boat from that named in the bill of lading would not constitute a rescission of a clause of the contract providing for shipment in a certain boat, where it was not shown that the clerk who received the goods was not the agent of the packet company to receive goods for the boat named in the bill of lading. *Ib.*

SPECIAL FINDINGS—The payment of premiums is an ultimate fact which the jury has the right to find in an action on an insurance policy.

Union Central Life Ins. Co. v. Hollowell, Admr., 150.

Exceptions to the conclusions of law upon the special findings of facts admit the truth of the facts found.

Indiana, etc., R. W. Co. v. Doremeyer, 605.

1. *Sufficiency.*—A special finding must find the facts and not mere matters of evidence. *Trustees, etc., v. Shoemaker's Estate, 319.*
2. *Practice.*—Complaint cannot be made of the failure of the court to itemize in the special findings the several amounts for which judgment was rendered where no motion was made to that effect.

Thomas' Estate v. Snyder, 146.

3. *Practice.*—Where a special finding is silent as to any fact it will be treated as a finding against the party having the burden of proving such fact. *Metropolitan Life Ins. Co. v. Bowser, 557.*

4. *Ventre De Novo.*—Where a special finding is defective in failing to find the material facts in issue the proper remedy is a motion for a *ventre de novo*.

Trustees, etc., v. Shoemaker's Estate, 319.

5. *Objections.—When Made for First Time on Appeal.—Appeal and Error.*—Where no objections were interposed by the complaining party in the court below to the court making a special finding of the facts he will not be heard to complain of same on appeal.
Swift, Admr., v. Harley, 614.
6. *Signature of Judge.*—Where it does not appear from the record that the judge who is shown to have tried the cause signed the special finding it will be treated as a general finding.
Smith v. Goetz, 142.
7. *Reversal of Judgment on Weight of Evidence.*—A judgment based upon a special finding of facts will not be reversed where there was evidence from which such facts could have been found.
Union Central Life Ins. Co. v. Hollowell, Admr., 150.
8. *Executors and Administrators.—Exceptions to Report.—Practice.*—The trial court may make a special finding of facts and state its conclusions of law thereon, as provided by section 551, Horner's R. S. 1897, in the trial of exceptions to an administrator's report.
Swift, Admr., v. Harley, 614.

SPECIAL VERDICT—As to conflict of findings, see *City of Columbia City v. Langohr, 395.*

Sufficiency of to sustain a judgment for plaintiff in an action against a railroad company for damages for injuries sustained on account of defective appliances, see **MASTER AND SERVANT, 3**; *Baltimore, etc., R. R. Co. v. Amos, 378.*

In action against railroad company for damages caused by fire escaping from track, must affirmatively show that plaintiff was without contributory fault. See **RAILROADS, 11, 12, 13, 14**; *Baltimore, etc., R. W. Co. v. Does, 680*; *Louisville, etc., R. W. Co. v. Carmon, 471.*

1. *Sufficiency.*—The special verdict must find in favor of the party having the burden of proof all the facts essential to a recovery.
Louisville, etc., R. W. Co. v. Carmon, 471.
2. *Elimination of Improper Matter.*—Where a special verdict after the elimination of improper matter consisting of conclusions of law and evidentiary facts contains enough facts to support a judgment within the issues, it will be held sufficient.
Paxton, Rec., v. Vincennes Mfg. Co., 265.
3. *Jury Should Find Ultimate Facts.*—It is the duty of a jury, in returning a special verdict, to find inferential or ultimate facts, and not evidentiary facts.
Voris v. Star City Bldg. and Loan Ass'n, 630.
4. *Ultimate Facts.—Practice.*—The question as to the manner in which plaintiff received an injury is one of fact to be found by the jury, and such conclusion will not be disturbed under a motion for a judgment on the verdict. *Baltimore, etc., R. R. Co. v. Amos, 378.*
5. *Weight of Evidence.*—Where there is evidence tending to support the findings in a special verdict the Appellate Court will not disturb the verdict on the sufficiency of the evidence. *Ib.*
6. Where fraud is an issuable fact, the jury should, in the special verdict, find fraud as an ultimate fact, and not the badges of fraud.
Voris v. Star City Bldg. and Loan Ass'n, 630.
7. *Practice.—Contracts.—Sales.*—It is the duty of the jury in an action on a contract of sale to find in the special verdict the facts

in relation thereto, and it is for the court to say whether a contract was entered into. *Moody v. Standard Wheel Co.*, 422.

8. *Sufficiency*.—The conclusion of negligence is not a question for the jury to find in a special verdict, and no error was committed in overruling a motion by defendant for judgment on the special verdict, in an action for damages, for the reason that there was no finding in the verdict that defendant was guilty of negligence.

City of Alexandria v. Young, 672.

9. *Sufficiency*.—A special verdict in an action against a board of county commissioners to recover for work and labor performed in preparing plans and specifications for a public building which shows that the board adopted the plans and received bids on them, and afterwards rejected them on account of imperfections therein is sufficient to support a judgment for defendant, where it was also shown in the verdict that plaintiff agreed that if his plans were not used in the construction of the building he was to receive no pay for them.

Geddis v. Board, etc., 274.

10. *Trespass.—Damages.—Railroads*.—In an action in trespass by a land owner against a railroad company for injuries to his land by reason of the destruction of a hedge fence thereon and the removal of defendant's tracks on his land, a special verdict finding that plaintiff was damaged in the sum of \$100.00 by reason thereof, and the value of the land decreased, will support a judgment in his favor without finding the market value of the land before and after the injury.

Cleveland, etc., R. W. Co. v. Davis, 459.

11. *Construction.—Practice*.—In construing a special verdict so as to apply the law to the facts, the court should look to the entire verdict, and not to isolated or detached parts of it, and if, after eliminating mere conclusions, there still remains sufficient inferential and ultimate facts, within the issues, upon which the judgment can rest, the verdict is sufficient.

Voris v. Star City Bldg. and Loan Ass'n, 630.

12. *Practice*.—A motion for a judgment on a special verdict is not waived by filing a motion for a new trial before the ruling on the former motion.

Ib.

13. *Objections*.—Where appellant made no objection to a special verdict, took no exception thereto, and moved for a judgment thereon, he will not be heard to object to it as such on appeal.

Kessler v. Citizens' Street R. R. Co., 427.

14. *Master and Servant.—Damages for Personal Injuries*.—A special verdict in an action for personal injuries found that plaintiff, a boy about eighteen years of age, who was employed in defendant's factory to assist in making dental supplies was required by defendant to run the engine, and instructed to report to certain other employes who had formerly run the engine anything which he might observe to be out of repair, and to follow the advice of such employes relative thereto; that plaintiff observed that a belt was worn and had begun to break, and reported the same to one of such employes, who instructed him to remove the belt and repair the same, and in attempting to remove the belt, without stopping the engine, he was caught by a set-screw in a revolving shaft, and injured; that plaintiff was not instructed to stop the engine before removing the belt, although he had seen the engine stopped on a previous occasion for the purpose of removing the belt. The jury found that the shaft was revolving at the rate of 240 revolutions a minute, and that plaintiff could not see the set-screw, and did not know of the existence thereof, although he had oiled the bearings on the line shaft within three inches of the set-screw once a day for

about three weeks prior to the accident. *Held*, that there was not such ambiguity in the verdict as to render it insufficient to sustain a judgment for plaintiff. *Keller v. Gaskill*, 502.

STREET IMPROVEMENTS—See MUNICIPAL CORPORATIONS; STREETS.

1. *Assessment Liens.—Foreclosure.—Secondary Liens.—Municipal Corporations.*—In an action to foreclose assessment liens for street improvements in order to render lands liable therefor which do not abut on the street improved, as provided in section 4290. Burns' R. S. 1894, it must be shown that the municipality took the statutory steps necessary to fix a lien on such lands. *Cleveland, etc., R. W. Co. v. Edward C. Jones Co.*, 87.
2. *Assessment Liens.—Foreclosure.—Complaint.*—It is not necessary in an action to foreclose an assessment lien for street improvements that the proceedings of the city council in making such improvements be set out at length in the complaint, but it is necessary to plead the acts done by the municipal officers, and such facts as show that they were rightfully done. *Ib.*
3. *Assessment Liens.—Foreclosure.—Street Improvement Bonds.*—The rights of plaintiff in an action to foreclose a lien for street improvements based upon bonds issued for such improvements are no greater than those of the contractor who made the improvements, and any defense defendant would have had in an action by the contractor, had he brought the suit, may be interposed in an action on the bonds. *Ib.*
4. *Compliance with Statute.—Jurisdiction.—Municipal Corporations.*—The proceedings of a municipality in making street improvements will not be held void on account of failure to comply strictly with the statute, where the municipality has jurisdiction over the subject-matter and the persons to be affected; but where some act in its nature jurisdictional is required to be done as a condition precedent to imposing such burden, the failure of the municipality to do the act required renders the proceedings void. *Ib.*

STREET RAILROADS—

Negligence.—Plaintiff sued defendant for damages on account of injuries to his buggy and team of horses caused by a collision with a street car. The special verdict showed that plaintiff drove upon the track about thirty or forty feet ahead of an approaching car for the purpose of passing another vehicle; that the motor-man on the car had no warning that plaintiff was going to turn upon the track, and did all in his power to stop the car before it struck the buggy. *Held*, that defendant was not guilty of negligence. *Kessler v. Citizens' Street R. R. Co.*, 427.

STREETS—See MUNICIPAL CORPORATIONS.

1. *Obstruction.—Municipal Corporations.*—A city has no power to authorize the erection of scales in the street. *City of Tell City v. Bielefeld*, 1.
2. *Obstructions.—Removal.—Municipal Corporations.*—An action cannot be maintained against a city for removing scales which had been erected in the street, where such removal was made in a careful and proper manner. *Ib.*
3. *Rights of Public.—Municipal Corporations.*—The rights of the public in a city street are greater than in an ordinary country highway. *Huas v. City of Evansville*, 482.
4. *Rights of Abutting Property Owners.—Removal of Soil from Street.—Municipal Corporations.*—A city can remove the natural

soil from a street and use it upon another street only when the improvement of the two streets is embraced in one and the same general plan of improvement. *Ib.*

5. *Rights of Abutting Property Owners.—Removal of Soil from Street.—Municipal Corporations.*—An abutting property owner who owns the fee of the street has the right to the surplus soil in excavations for the improvement of such street; but he must take possession thereof, or show a legal excuse for not doing so, and upon his failure to remove same within a reasonable time the city may treat it as abandoned, and use it in the improvement of other streets. *Ib.*

SUICIDE—When question is in issue as to whether the insured died from natural causes or committed suicide, the court will presume, in the absence of evidence, that he died from natural causes. See *INSURANCE*, 15; *Union Central Life Ins. Co. v. Hollowell*, 150.

SUMMONS—See *PROCESS*.

1. *Service by Copy at Place of Business.*—The service of a summons upon a defendant by leaving a copy at his last and usual place of business is not in compliance with the statute requiring a summons to be served either personally on the defendant or by leaving a copy thereof at his usual or last place of residence. *Stout v. Harlem, Admr., 200.*
2. *Service by Copy at Place of Business.*—A judgment rendered upon service by copy at defendant's last and usual place of business is without jurisdiction of the person, and void, where defendant's residence and place of business were in the same city, about a mile apart, and he was absent from the city at the time the officer left the summons and made the return. *Ib.*

THEORY—A pleading cannot perform the two-fold purpose of an answer in bar and also as asserting a cause of action.

Stout v. Harlem, Admr., 200.

Parties are bound by the theory upon which they try their case, and must recover upon that theory or not at all.

Tinsley v. Fruits, 534.

TOWNSHIP TRUSTEES—

1. *School Supplies.*—Sections 8081, 8082, Burns' R. S. 1894, providing that before a township trustee can contract a debt in excess of the fund on hand to which the debt is chargeable he shall obtain an order from the board of county commissioners, etc., is not applicable to a debt incurred for stoves used in the schoolhouses of the township. *Clark School Tp. v. Grossius, 322.*
2. *Contracting Debts Contrary to Law.*—Where a township trustee contracts a debt contrary to the provisions of sections 8081, 8082, Burns' R. S. 1894, and anything for which the trustee has the authority to expend money from the special school fund has, under the contract, been received and retained by the school township which is beneficial to such township, there may be a recovery against the township for the benefit so derived by it. *Clark School Tp. v. Home Ins., etc., Co. 543.*
3. *Insurance of School Property.*—Under the provision of section 5920, Burns' R. S. 1894, placing upon a township trustee the duty of caring for and managing the school property belonging to the

township, he has such implied authority, that in the exercise of his discretion, he may make reasonable expenditures from the special school revenue in procuring insurance on such property against fire. *Ib.*

TRESPASS—In action by land owner against railroad company. See SPECIAL VERDICT, 10; *Cleveland, etc., R. W. Co. v. Davis*, 459.

TRUSTS—

1. *Advancements.—Husband and Wife.*—Where a father made an advancement to his daughter's husband without any intention or agreement of the parties that the money should be repaid to the wife, no trust was thereby created in her favor.

Heath, Admr., v. Carter, 83.

2. *Competency of Trustee.—Presumption.—Conflict of Laws.*—The courts of this State will presume that a corporation appointed in another state as a co-trustee in an assignment for the benefit of creditors was competent to act. *Union Savings Bank and Trust Co. v. Indianapolis Lounge Co.*, 325.

VENIRE DE NOVO—A written motion need not be made for a *venire de novo*. *Swift, Admr., v. Harley*, 614.

Should be granted where a verdict or finding is so uncertain that it will not support a judgment. *Ib.*

VERDICT—See SPECIAL VERDICT.

As to when court may direct, see INSTRUCTIONS, 8; *Hamilton v. Hanneman*, 16.

WAIVER—Errors assigned on appeal are waived if not discussed. *Hamilton v. Hanneman*, 16; *Pierce v. Walton*, 66; *Thomas' Estate v. Snyder*, 146.

WAREHOUSEMEN—A railroad company is only bound to the exercise of ordinary care in storing and caring for unclaimed baggage. *Indiana, etc., R. R. Co. v. Zilly*, 569.

Where baggage is not called for within a reasonable time after its arrival the liability of warehouseman attaches, and that of carrier ceases. See RAILROADS, 1; *Ib.*

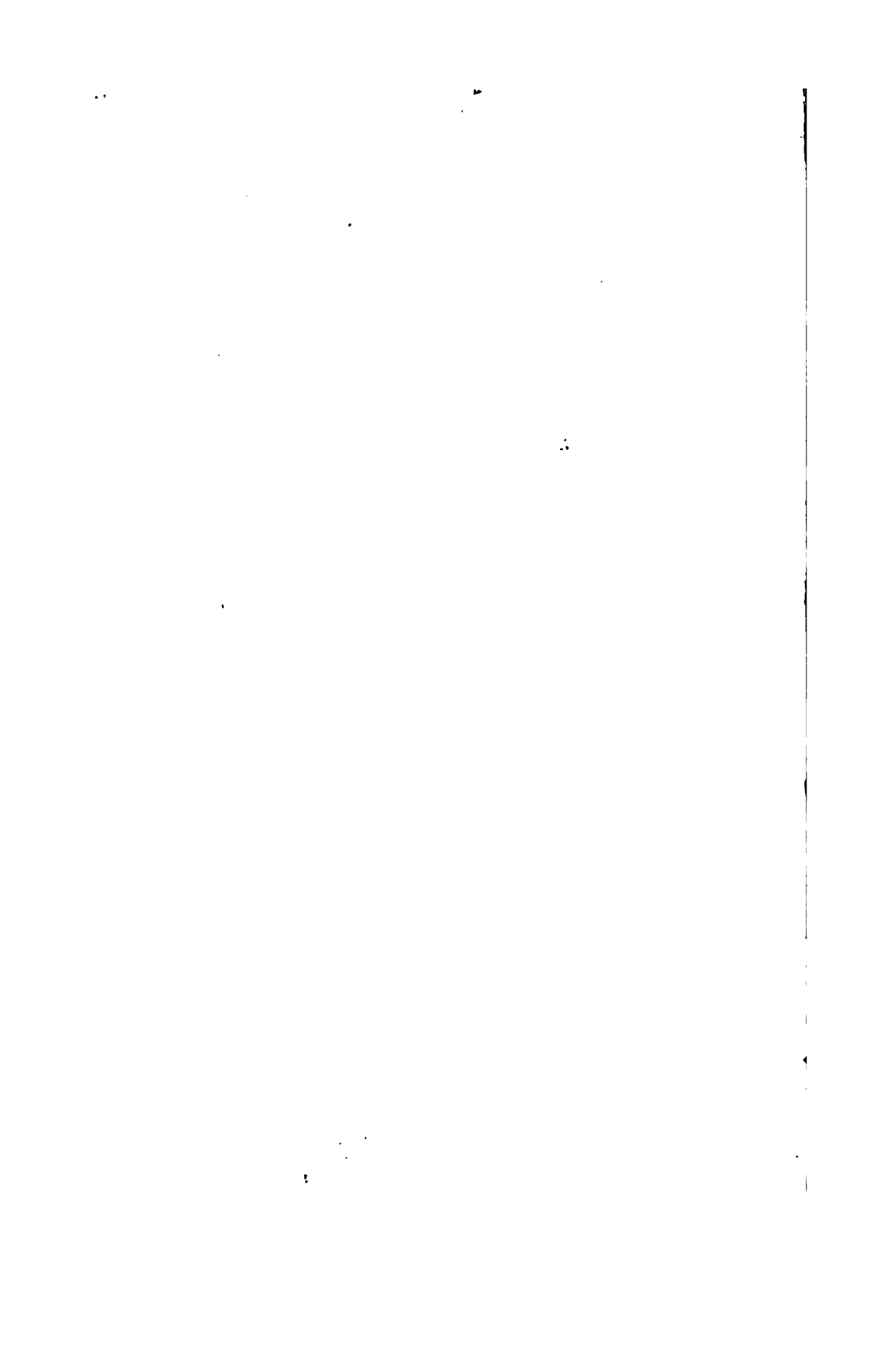
WITNESSES—Adverse parties as witnesses in an action against a decedent's estate, see DECEDENTS' ESTATES; *Schlemmer, Admr., v. Schendorf*, 447.

1. *Evidence.—Expert Testimony.—Competency.*—The extent of a witness' knowledge of the subject-matter about which he testifies as to values goes to the weight of his testimony, and not to its competency. *Fox v. Cox*, 61.
2. *Expert Testimony.—Discretion of Court.*—The extent of a witness' knowledge before being permitted to testify as to the value of mill machinery is within the discretion of the trial court, and it is only where there is a total lack of such knowledge, or there is a palpable abuse of such discretion, that the appellate tribunal will interfere. *Ib.*

WORDS AND PHRASES—As to use of words warranty and guaranty in contract of insurance, see INSTRUCTIONS, 4; *Masons' Union Life Ins. Ass'n v. Brockman*, 206.

Construction.—Rules of Court.—Change of Venue.—Where a rule of court requires that applications for change of venue must be made by the second Wednesday of the term of court, an application made on the second Wednesday is a sufficient compliance with the rule.
Walters v. Stockberger, 277.

EX. 100



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